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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (1991)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-sixth session, prepared by the Secretariat

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INTRODUCTION

1. At its forty-sixth session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 20 September 1991, to include in the agenda of the session an item entitled "Report of the International Law Commission on the work of its forty-third session" 1/ (item 128) and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 22nd to 37th meetings and at its 43rd and 44th meetings, held from 28 October to 13 November and on 25 and 26 November 1991. 2/ At the 22nd meeting, the Chairman of the Commission at its forty-third session, Mr. Abdul G. Koroma, introduced the report of the Commission. At its 44th meeting, on 26 November, the Sixth Committee adopted draft resolution A/C.6/45/L.16, entitled "Report of the International Law Commission on the work of its forty-third session". The draft resolution was adopted by the General Assembly at its 67th plenary meeting, on 9 December 1991, as resolution 46/54.

3. By paragraph 11 of resolution 46/54, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the Commission's report at the forty-fifth session of the General Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

4. The document opens with a section A entitled "General comments on the work of the International Law Commission and the codification process". Section A is followed by six sections (B to G), corresponding to chapters III to VIII of the report of the Commission. 3/

1/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10).

2/ Ibid., Sixth Committee, 22nd to 37th, 43rd and 44th meetings.

3/ Since the Commission has concluded its work on the topic "Jurisdictional immunities of States and their property", dealt with in chapter II of its report on the work of its forty-third session, the debate held in the Sixth Committee on that topic is not summarized in the present document.

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TOPICAL SUMMARY

A. GENERAL COMMENTS ON THE WORK OF THE INTERNATIONAL LAW COMMISSION

5. Some representatives commented on the backdrop to the work of the International Law Commission. Thus it was deemed important that international law should hold a respected place in a rapidly changing world where its relevance to the international community's collective problems had seldom been greater. Further development of international law was viewed as the most effective way to move the new world order in the direction of the peace and well-being sought by all. The remark was also made that universal acceptance and respect for rules of international law regulating the basic relations between States constituted an essential foundation for building a new peaceful and stable international order, as had been once again confirmed during the Gulf crisis. Quoting from the address of the President of his country to the General Assembly, one representative emphasized that a just world was one where international law was respected and applied, and he insisted on the obligation of States to apply the rule of law and the appropriate process of peaceful settlement of disputes, including recourse to the International Court of Justice, and to refrain from imposing the will of the stronger.

6. Some representatives stressed that the codification and progressive development of international law could not take place in isolation from the current situation and that, in the future development of international law, account should be taken of the profound change which the international community was undergoing.

7. The comments made in this context focused on changes in the political climate. Thus, one representative remarked that the international community was undergoing a transition from confrontation to cooperation; another referred to the steady disappearance of the previous ideological frames of reference and observed that States were operating in a world in transition in which the concept of the State and its relationship with the individual was undergoing constant change. A third representative highlighted the positive changes in the political atmosphere and expressed the conviction that the mutually acceptable resolution of complex legal questions would enhance the role of international law and establish its primacy in the solution of the practical problems of relations between States.

8. Reference was also made by one representative to changes in the economic and technological fields. That representative stressed that the increase in international trade and in technological development was creating new needs and concerns which had to be addressed effectively so as to promote the rule of law in the international community.

9. Also noting that the development of international law was a constantly evolving process, one representative emphasized the Sixth Committee's responsibility in giving impetus to the application of the rules of international law and the resolutions of the United Nations, as well as to the strengthening of mechanisms for third-party dispute settlement and to cooperation in combating terrorism and drug trafficking.

10. Many representatives insisted on the fundamental role of the International Law Commission in the development of international law, a role which was described by one representative as valuable, constructive and independent and which, some noted, was highlighted by the United Nations Decade of International Law. Attention was drawn to the Commission's potential to establish a sound international legal framework for future generations.

11. While it was recalled that the Commission had made an important contribution to the codification of international law by formulating a number of conventions which formed the core of contemporary international law, some representatives warned against overemphasizing the codification function of the International Law Commission. One of them observed that the process of codifying current practice was an attempt to maintain the status quo in favour of the developed countries, since it was their practice alone that was taken into account. He remarked that, while developing countries could conceivably demand that their socio-political stuctures should be included among the practices to be codified, certain developed countries were requiring changes in the socio-political environment in developing countries as a precondition for economic assistance. He concluded that the codification of State practice amounted to a perpetuation of an unjust economic system, whereas the law should be used as a tool for effecting the changes necessary to bring about a new world order. Another representative insisted that from now on the Commission give particular attention to the progressive development of international law and focus on how it might respond to the changing needs of the rapidly evolving international community. In his view, the Commission's usefulness in the future would depend on the extent to which it managed to perform that task successfully.

12. As for the way in which the progressive development of international law should be envisaged, it was suggested that the approach be problem-oriented, rather than ideological, so that the final output reflected the actual world situation. The hope was expressed that the Commission would respond appropriately to the needs and concerns of the international community and would continue its efforts to establish an international legal order which would serve the cause of world peace and prosperity.

13. Commenting specifically on the outcome of the latest session, many representatives expressed satisfaction with the Commission's report which, it was stated, constituted a solid basis for detailed, constructive and fruitful discussion of the urgent juridical needs of the world community. It was noted that the Commission had achieved the ambitious targets which it had set itself at the beginning of the five-year term of office of its members: it had concluded its consideration of the topic "Jurisdictional immunities of States and their property" by adopting the final version of a set of draft articles and it had provisionally adopted two sets of draft articles on two other topics in its programme of work, i.e., the draft Code of Crimes against the Peace and Security of Mankind and the law of the non-navigational uses of international watercourses. Furthermore, at its forty-first session, the Commission had approved the final version of the draft articles on the status

of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and of the draft optional protocols thereto. In addition to those achievements, the Commission had made progress on the topics "International liability for injurious consequences arising out of acts not prohibited by international law", "Relations between States and international organizations" and "State responsibility".

14. As regards the relationship between the International Law Commission and the Sixth Committee, one representative stressed that the role of the latter was to make general comments on the report of the former and to give it guidance on legal and political matters, thereby contributing in the most effective way to the attainment of the objective of the codification and progressive development of international law.

15. More specific comments on ways and means of promoting the dialogue between the Sixth Committee and the International Law Commission are reflected in section G below.

B. THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES 4/

1. General observations

16. Many representatives emphasized the importance of the topic which, it was remarked, was of concern not only to States bounded or crossed by international watercourses but also to the international community as a whole since it was related to the use of fresh water, which was increasing, and to the protection and preservation of the environment, which was of growing concern to the international community. The topic was viewed as all the more worthy of attention as problems concerning the sharing of water resources had remained a constant source of tension and even of serious conflict.

17. A number of representatives were of the view that a codification effort in this area of international law would serve a useful purpose. It was pointed out, in particular, that at a time of rapidly increasing demands for fresh and pure water supplies, it was urgent for the international community to adopt appropriate measures to safeguard such supplies for future

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4/ Several representatives noted that Member States would be requested to submit their comments and observations on the draft articles by 1 January 1993 and announced that their Governments would comply with that request. One of them expressed the hope, in this context, that as many States as possible would take the opportunity to submit their comments. He noted that in recent years the Commission had not always received as wide and candid a response as would be desirable, a shortcoming which had contributed to some of the problems encountered at the final or legislative phase of the codification effort.

generations. The remark was also made that there had been a growing number of disputes over diversion of waters, flow reduction, pollution, salinization, sedimentation in tributaries and floods caused by erosion, because the situation had evolved substantially since similar questions had been studied in the 1930s by the Institute of International Law.

18. Some representatives, on the other hand, expressed some doubts about the feasibility of drafting articles on the non-navigational uses of international watercourses that would be suitable for application to international watercourses in general, since they varied so much in size, location and characteristics. The remark was made in this context that while many international treaties had been concluded on the subject, there were very few principles contained in them which were suitable for codification and that every watercourse, and indeed every section of a watercourse, depended on specific geographic, demographic and human factors.

19. Many representatives welcomed the adoption on first reading of the draft articles on the law of the non-navigational uses of international watercourses. Some regretted that the work in this area had not proceeded more expeditiously. Thus, one representative said that it had taken too long to reach the current stage in the elaboration of the draft articles, adding that, since a request for the study of a given topic was likely to rest on the premise that the codification and development of the relevant rules were useful, the Commission should arrange to conclude its work on each topic within a fixed period of time. Other representatives, however, remarked that although the Commission had been criticized because of its slow progress in completing its assigned task, that was to a large extent due to its extensive programme of work and to the fact that a number of significant issues had to be considered simultaneously in the course of relatively short yearly sessions. Attention was also drawn to the care that was required to ensure that the draft articles and the terms used were soundly based on scientific reality.

20. The outcome of the Commission's work in this area generally met with approval. Thus, one representative said that the report lucidly described the scope of conventional law and practice regarding the non-navigational uses of international watercourses and that the draft articles provided a helpful way of approaching problems relating to the use of international watercourses. Another representative stressed the usefulness of the work accomplished by the Commission in a difficult area of international law and expressed the view that, with a few adjustments, the text provisionally adopted by the Commission would provide a reasonable basis for future negotiations. Still another representative viewed the Commission's work as a valuable contribution to the international protection of the environment; he expressed general satisfaction with the direction in which the work was progressing and acknowledged many improvements in the previously adopted articles. The draft submitted by the Commission was described as innovative, balanced in terms of substance and clear and easily accessible in terms of form and as striking a proper balance between excessively detailed rules and rules which were too general.

21. Some representatives, on the other hand, held the view that the draft articles were not satisfactory in every respect. One of them remarked that the Commission had formulated not principles specific to watercourses but principles of the international law of good-neighbourliness in its widest sense 5/ and that the draft provided for a series of procedures which could be applied not only to the utilization of watercourses, but to all situations in which a State undertook activities in its territory which affected the interests of a neighbouring State. 6/ Another representative said that in fact the draft articles did no more than implement the general principle *sic utere tuo ut alienum non laedas* and create a notification, consultation and negotiation procedure between interested States with a view to achieving appropriate, i.e., equitable and reasonable, use of the common waters. As regards the draft's general acceptability, a third representative noted that in certain respects, particularly with regard to procedural rules, the draft went beyond existing rules of customary law, even though in most other respects it represented a codification of existing rules.

22. A number of representatives elaborated on the overall approach to be taken to the topic. Some of them stressed that in working out draft articles on the non-navigational uses of international watercourses it was necessary to strike the right balance between various concerns and principles. One representative, for example, stated that it was very difficult to draft articles in this area because international watercourses flowed through different States and accordingly constituted natural resources of the respective riparian States.

23. The discussion made it clear that in elaborating a legal regime concerning the uses of international watercourses it was necessary to balance: (1) the requirements of global resources management and State sovereignty; (2) sovereignty and sovereign equality of States; (3) protection and development; and (4) the legal positions of upstream States and downstream States.

24. On the first aspect, one representative noted that the Special Rapporteur's seventh report had shown a preference for the adoption of hydrological unity as the basis of a legal regime to govern water resources in general and international watercourses in particular. While agreeing that geographical and hydrological factors deserved serious attention, he

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5/ One representative, on the other hand, pointed out that the concept of a watercourse system implied a close relationship between watercourse States since they shared a natural resource, and that their solidarity was certainly greater than mere good-neighbourliness. In his view, those States were not so much neighbours as joint owners.

6/ On this point, one representative remarked that the fact that some principles contained in the draft did not apply only to rivers did not detract either from their validity or the usefulness of the exercise.

questioned the relevance of those factors to the development of a regime on watercourses which crossed international boundaries, thereby bringing into play other equally relevant factors such as State sovereignty, mutual benefit and the primacy of the State's sovereignty over its natural resources. In his view, the protection, planning and development of water resources should be based on the needs of the population of the territory through which the river first flowed, in accordance with the principles of optimal, reasonable and equitable distribution of water resources, and while integrated basin-wide and regional development, protection and planning were desirable, the basic consideration should be the common interests of States in the region. Another representative placed similar emphasis on the principle of the right of the State of origin to use and exploit its natural resources, a right which derived from the legal and political sovereignty of the State.

25. On the second aspect, one representative remarked that the principle of the sovereign equality of States required that, while they had the freedom to engage in any activity, States should refrain from injuring the interests of other States, provided, however, that the interests of all States were promoted and no unacceptable right of interference was accorded to one or more States in the sovereign domain of another State. Another representative similarly recognized that sovereignty should be exercised in such a way as not to cause appreciable harm to other watercourses.

26. As regards the third aspect, balancing development and protection, some representatives warned against placing undue emphasis on the damage which could be caused to watercourses' ecosystems and taking insufficient account of the economic development requirements of watercourse States. The view was expressed in this connection that the obligation of States to protect and preserve ecosystems called for the broadest spirit of cooperation among States and that only firm determination to act on a foundation of solidarity and just and equitable collaboration could yield positive results.

27. As to the fourth aspect - balancing the rights and obligations of upstream States and those of downstream States - one representative remarked that, while the principle that States in which an international watercourse originated should enjoy priority use of that watercourse was a logical extension of the principle of sovereignty, States enjoying priority use naturally had to do their best to prevent injury to downstream States, and a proper balance had to be preserved between the interest of those two categories of States. Some delegations felt that the Commission's draft privileged downstream States. One of them cited in this context article 21, paragraph 2, which, in effect, extended the scope of article 7 to the sphere of environmental protection. He remarked that upstream States would be the most severely affected by the introduction of such a rule. Another representative observed that in their current State the draft articles could be used to maintain the status quo, causing difficulties or delays to those upstream States which wished to develop their watercourses by obliging them to obtain the approval of the downstream State or States on each occasion. Emphasis was, on the other hand, placed on the need to reinforce the obligations of upstream States. Thus, one representative proposed that the

draft articles should stipulate that upper riparian States did not have the right to divert the natural flow of an international river through unilateral action; were obliged to refrain from implementing any projects that could cause alterations in the existing water system without the consent of lower riparian States; and should respect the existing or traditional water uses of lower riparian States. He added that provision concerning the breach of those obligations should also be included. Elements which were mentioned as relevant to the achievement of a constructive balance among those concerns included the obligation to negotiate and cooperate, the principles for utilization and equitable and reasonable participation in the watercourse system, the obligation not to cause appreciable harm and the obligation to prevent, reduce and control the pollution of watercourses.

28. Several representatives felt that the draft should contain provisions for resolving eventual disputes over conflicting uses of an international watercourse. The view was expressed in this connection that a mere reference to general international law would not suffice.

29. As regards the form which the end-product of the Commission's work should take, it was widely recognized that the complexity and diversity of geographical, political, economic, environmental and legal issues relating to particular watercourse systems made it impossible to establish one set of binding legal obligations for all international watercourses. Many representatives consequently agreed that since rivers could not all be subjected to a uniform regime if it was too detailed or restrictive, the most suitable solution appeared to be a framework agreement, which would avoid the need to tackle the myriad of attendant problems and leave the specific rules to be applied to individual watercourses to be set out in agreements between the States concerned, as was the current practice.

30. Divergent views were, however, expressed on the concept of a framework agreement.

31. One issue which was raised in this context was whether the provisions of the envisaged framework agreement should be binding in nature. Some representatives felt that the draft instrument should, as one representative put it, consist of a framework of residual rules and not merely a code of conduct or, in the words of another representative, be codified in the form of a convention rather than aim at the establishment of model rules or guidelines. Other representatives felt that the Commission should be providing guidelines for future agreements or a set of model rules. One representative stressed that a set of model rules would be all the more appropriate as the lack of scientific data might in certain cases make it difficult to determine the exact scope of the obligations which States would be called upon to undertake. 7/

7/ In this connection, see paragraph 44 below.

32. One representative suggested that the proposed framework convention comprise a collection of articles reflecting the customary law applicable to the riparian States of a single watercourse, even in the absence of any conventional undertaking between those States, followed by one or more annexes offering more detailed model agreements or clauses which the riparian States of any given river could adopt or draw on for their negotiations, and examples of cooperation. In his view, the collection of articles composing the convention proper could deal with many of the subjects tackled in the current draft, for example, use of terms, watercourse agreements, notification, emergency situations and non-discrimination. He added that whatever solution was adopted, it would have to be flexible enough to be adaptable to every situation and not try to impose *in abstracto* what could only be achieved by agreement and cooperation between the interested parties, the riparian States.

33. A second issue which was raised in this context was that of the status of a framework agreement *vis-à-vis* any specific agreements that might be concluded between watercourse States. Regret was expressed that the Commission's draft should not be more explicit on this point. One representative insisted that it be made clear at the outset that States had the right to opt into the framework agreement, partially or wholly, or to opt out of it when, for example, existing international treaties adequately covered a particular situation.

2. *Comments on part I* (Introduction)

34. The remark was made that, notwithstanding their title, the draft articles covered the navigational uses of international watercourses by virtue of paragraph 2 of *article 1* - an approach which was viewed as the correct one.

35. *Article 2* was extensively commented upon. Observations focused on (1) the "system" approach, (2) the question whether the definition of an international watercourse should encompass groundwater and (3) the concept of a "common terminus".

36. On point (1), it was recalled that although the geographical and legal implications of the "system" approach over the "territorial" approach were not yet fully clear, the former had been steadily gaining ground in doctrine and State practice, as had become evident from the Helsinki Rules adopted by the International Law Association in 1966. The concept of a "watercourse" system or, in the words of one representative, "the idea that the waters of such a system were interconnected in such a way that they constituted, by virtue of their physical relationship, a unitary whole" was endorsed by several representatives. This concept was described as appropriate in that it made it possible to manage, administer and control common waters in such a way as to ensure their correct use and preserve them from harm.

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37. Some representatives, however, questioned whether the concept of an international watercourse system, a concept which had long been controversial in the Commission and in the Sixth Committee, should be used in the draft and cautioned against overstretching the concept of an international watercourse. Attention was drawn to the practice of States in this area and to the fact that, even if some watercourse agreements embraced the whole or the greater part of a hydrographic basin, that was not generally the case. The remark was also made that a broad concept, however justifiable from the scientific point of view, might not elicit the support of all watercourse States, especially upstream ones, and that while the argument developed in the commentary in favour of such a broad concept was persuasive from the philosophical, environmental and legal points of view, the issue raised serious political problems for many States. Emphasis was further placed upon establishing a balance between the interdependence of riparian States and their sovereignty over natural resources and also between different uses. Thus, one representative, while recognizing the need for an overall approach to an international watercourse as a system in constant motion, an approach which would take full account of the principle of equitable and reasonable utilization of the watercourse, observed that at the current stage of scientific, technological and industrial development an unduly broad approach might to some extent restrict the right of each country to utilize its own resources in accordance with national priorities and interests. Another representative recalled that his delegation had always supported the idea of defining the term "international watercourse" so as to make it clear that it was a system consisting of hydrographical elements which, by virtue of their physical interdependence, constituted a unitary whole, some parts of which crossed State boundaries.

38. Along the same lines, one representative, whose views were subsequently endorsed by another representative, indicated that he had no objection to defining a watercourse as a "system of waters", on the understanding that that did not mean that the articles would necessarily apply to every single part of the watercourse but would apply only if and when the use of the watercourse or of its waters in the part in question affected uses in another State. He remarked that even if hydrologically all the parts of a watercourse constituted a unitary whole, it did not necessarily follow that they came under the purview of the draft articles and that the concept of an international watercourse continued to be, legally speaking, a relative one. He therefore saw no need to modify a terminology which had become traditional but warned that the commentary to article 2 should be clarified on this point.

39. The question whether, for the purposes of the draft articles, a watercourse should be regarded as having a relative international character elicited comments on the part of several other representatives. Some of them held the view that the Commission had given a persuasive reason why the notion of the relative international character of a watercourse, which formed part of the so-called working hypothesis, should be abandoned, and accordingly supported the Commission's conclusion that the notion of relativity should be dropped.

40. Other representatives disagreed with this view. One of them considered it inappropriate at the current stage to overlook entirely the working hypothesis that a watercourse was international only inasmuch as utilization of its water affected the water in another system. Another representative stressed that the 1980 working hypothesis providing that, to the extent that parts of the waters in one State were not affected by or did not affect uses of waters in another State, they should not be treated as being included in the international watercourse system, was an inviolable whole and that the Commission's abrupt decision at its forty-third session to incorporate the idea of "system" in the definition of watercourses and its inconsistent treatment of the working hypothesis deserved further consideration. A third representative indicated that the Special Rapporteur's emphasis on the unity of the hydrological cycle required further study and that the draft articles should continue to be based on the working hypothesis adopted by the Commission concerning the relative international character of watercourses. In his view, international watercourses could be treated as a system only in the limited sense that their use could cause substantial harm or injury to co-riparian States.

41. As regards point (2), namely the question whether the definition of an international watercourse should encompass groundwater, some representatives drew attention to the distinction to be made between groundwater related to surface water (free groundwater) and confined groundwater. A few felt that since the problems and principles were the same for both categories, the latter should be covered in the current draft to avoid the necessity of drafting a separate convention on the former. The prevailing view, however, was that the question of confined groundwater was a separate topic, even though the concept was relevant to the general settlement, at some later time, of issues relating to international watercourses. Satisfaction was therefore expressed with the Commission's decision to exclude self-contained underground reservoir States physically connected with the watercourse system from the scope of the draft.

42. As regards free groundwater, three main trends emerged. Some representatives supported the inclusion of free groundwater in the scope of the draft. It was pointed out that geographers, hydrologists and other experts agreed that surface water and underground water should not be treated separately for legal and planning purposes. The remark was also made that the necessity of regulating the rights and obligations of international watercourse States in relation to underground waters became evident when it was realized that the waters in question constituted approximately 97 per cent of the freshwater resources on Earth, excluding ice-caps and glaciers. A further argument was that what was done in any part of the system would affect the rest and the more groundwater connected with international watercourses a country had, the greater its need to have some means of protecting its water resources.

43. Other representatives criticized the Commission's decision to enlarge the scope of rules normally formulated for surface waters. In the view of one representative, such a decision not only exceeded the Commission's mandate but

made it still more difficult to formulate draft articles on a subject which was already extremely complex by its very nature. Another representative pointed out that the decision would entail a comprehensive review of existing maps, which did not indicate groundwater. He observed that developing countries, in particular, did not have the means to revise their maps accordingly, and that a definition which included groundwater might have the effect of making many watercourses "international", with incalculable consequences.

44. Still other representatives, although not rejecting outright the idea of covering free underground water in the draft articles, drew attention to the difficulties which such an approach might entail and called for further reflection on the matter. One of them insisted that particular attention should be paid to resolving such problems as the demarcation between "free" and "confined" groundwater and the physical link between the latter and surface water and noted that in preparing the draft articles less account had been taken of the specific features of groundwater, the conditions for its exploitation and its protection from pollution. Another representative emphasized the need to bear in mind that there would be situations where the physical relationship between a groundwater source and an international watercourse might be difficult to determine, and others where it would be very difficult to prove scientifically in what form and under which countries groundwater existed. He therefore said that, owing to the dearth of scientific data and studies on the subject, the question of groundwater might present insurmountable difficulties. He concluded that, in proceeding with codification in that area, a consideration of the physical relationship had to be combined with an approach aimed at establishing rights and duties with regard to a core issue by providing a single, clear definition of that issue. A third representative, while acknowledging that the decision to include groundwater within the definition of an international watercourse was both imaginative and sensible inasmuch as in many areas of the world the substantial water resources were groundwater, which provided the main source of drinking water, recalled that the Commission was planning a set of articles to be embodied, in due course, in a framework agreement, which would impose obligations on the ratifying States, and that those States would need to know precisely, at the time when they accepted the framework agreement, what obligations they were undertaking. He remarked that the location and extent of surface water were more or less readily apparent, so that a State could identify the scope of its obligations, whereas the location and size of underground water, or its interaction with the watercourses of other States, might not be known. While agreeing that such questions could, with time, money and expertise, be investigated, he pointed out that States, and in particular developing States, might have other, prior calls on their resources. He suggested as a possible solution to aim for a set of model rules rather than a framework agreement, it being understood that those rules would be embodied, as necessary, in a specific agreement relating to an identical watercourse and that, presumably, any necessary scientific studies as to the extent of the watercourse would be carried out before a State subscribed to it. He viewed such an approach as a worthwhile alternative inasmuch as a framework agreement would, in principle, apply to all

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international watercourses throughout the territory of a State, and it would be a very different matter, and possibly unrealistic, to expect to have knowledge of all such watercourses and of the full extent of the obligations resulting from such an agreement.

45. The third question which was raised in relation to the definition of an international watercourse concerned the concept of "common terminus". Some representatives criticized that concept. One of them remarked that the phrase "flowing into a common terminus" misrepresented the scope of an international watercourse system, for the scope as thus defined could well extend to a large part of the territory of a State, which would then be unreasonably included in the scope of an international watercourse system and placed under joint international jurisdiction, with a consequent encroachment on the sovereignty of the State in question. Another representative observed that the concept in question left unresolved the question whether the draft was intended to apply to a system of waters composed of, for example, lakes, groundwater and canals unrelated to any river and therefore not flowing anywhere. Other representatives supported the concept in question, pointing out that, in its absence, two or more natural watercourse systems flowing into different seas but linked by canals could artificially be treated as a single watercourse. One of those representatives raised the question of tributaries. He insisted that tributaries should only be considered to be part of an international watercourse if they themselves crossed boundaries and that their effect on the main watercourse could be taken into consideration in specific cases, for instance when investigating sources of pollution. He remarked that subjecting all tributaries to the same legal regime as the main international watercourse could result, in some cases, in a considerable and unjustified increase in the obligations to be placed on the States in which they were situated, He therefore advocated a restricted definition which, in his view, was more in keeping both with customary law and with the logic of a framework convention intended to leave it to individual watercourse agreements to incorporate more extensive definitions where they were justified.

46. One representative stated that the definition in article 2 should be supplemented by a definition of "non-navigational uses". He insisted on the need to define what was meant, not by "non-navigational", but by "uses" of a watercourse, or of water itself, and to make a clear distinction between water use activities, which were covered by the draft articles, and activities on land, which were not. He noted that, while the title of the draft articles referred to "uses of watercourses", the example, mentioned in footnote 112 to the Special Rapporteur's seventh report, of a plant discharging toxic waste was a question of the protection and conservation of watercourses, which was beyond the Commission's mandate. He suggested that a general definition of "uses" of international watercourses would make it possible to exclude other land-based or even atmospheric activities such as massive air pollution and could also help to allay the entirely legitimate concerns of States which feared that the broad concept of "water systems" in the definition of the term "watercourse" might constitute a massive and unjustified interference in the territorial sovereignty of the State.

47. On article 3, the view was expressed that paragraph 3 should be amended so as to place an obligation on States to negotiate in good faith.

48. With respect to article 4, one representative suggested that a provision similar to that contained in paragraph 1, which gave every watercourse State the right to participate in the negotiation of any agreement applying to the entire watercourse, should be included in all draft articles. As for paragraph 2, another representative suggested that it should confer on a watercourse State which considered that some of its current or proposed uses of an international watercourse might be affected to an appreciable extent by the implementation of a watercourse agreement applying only to a part of the watercourse or to a particular project, programme or use the right to participate in consultations on, or in the negotiation or elaboration of, such an agreement and to become a party thereto. She further suggested that the draft articles should also require a watercourse State that participated in consultations on, or in the negotiation or elaboration of, a watercourse agreement and which was aware of the possible appreciable effect of the use which another watercourse made or planned to make of the watercourse to inform such State of the possibility as early as feasible.

3. Comments on part II (General principles)

49. The remark was that this part of the draft, dealing with the principles which should govern the activities of States with regard to the non-navigational uses of international watercourses, was of great significance, since States must act within a clearly defined code of conduct based on justice and equity. For that reason, it was proposed that some principles which had been included in earlier versions of the draft but deleted from the current one should be reincorporated, namely, good faith and the prohibition of the abuse of rights.

50. With reference to article 5, several representatives stressed the importance of the principle of equitable and reasonable utilization in ensuring the required balance between the interests of upstream and downstream States. That principle was viewed as having a major preventive role in that it provided a basis for the settlement of conflicts concerning the use of international watercourses. Attention was drawn in this context to the danger that any watercourse State could effectively veto any new use of a watercourse by claiming that such use entailed a risk of appreciable harm. The remark was further made that, under the proposed article, the implementation of the principle depended on the cooperation of upper and lower riparian States and that the text should be reinforced on that subject.

51. Some representatives expressed reservations on the article. One of them felt that the term "equitable and reasonable manner" needed to be defined clearly. He insisted that article 5 should not oblige watercourse States to share the benefit they derived from the use of a watercourse and should be read in conjunction with article 7, which imposed an obligation on watercourse States to utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.

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52. With respect to paragraph 1, it was suggested to replace "optimal utilization" by "optimally sustainable utilization" in order to strengthen the text.

53. Paragraph 2 was viewed as dispensable since the concept of participation seemed non-essential and could give rise to difficulties or misinterpretations. Another remark was that the concept of participation merited further discussion and should perhaps be replaced by the term "cooperation", which implied mutual understanding between watercourse States in utilizing and managing the international watercourse.

54. Article 6 was considered as useful by some representatives but as possibly unnecessary by others who viewed the list of examples of "relevant factors and circumstances" as superfluous.

55. One delegation suggested that there be added in paragraph 1 a subparagraph referring to a balance between the benefits and drawbacks which a new use or modification of an existing use could entail for watercourse States. Another delegation strongly supported the inclusion of environmental and demographic considerations and of the vital needs of riparian States among the factors relevant to equitable and reasonable utilization set forth in the article.

56. As for paragraph 2, one representative suggested that it should provide for an obligation to negotiate, having regard to the factors listed in paragraph 1, with a view to determining in the specific case what was equitable and reasonable.

57. Some representatives endorsed the general approach reflected in article 7, which, it was stated, set up a legal framework for regulations which had proved effective in practice. Other representatives advocated a strengthening of the present text. One of them held the view that the article should impose the obligation to take all necessary measures to prevent harm. Another representative, after observing that it followed from the principle of equitable utilization that States should be prohibited not only from causing appreciable harm to other riparian States in their use of an international watercourse, but also from engaging in any such use that could have adverse effects on other States, suggested that article 7 should include criteria for determining appreciable harm and adverse effects on riparian States, since, for example, the site at which a watercourse was used significantly influenced the effects of such use. He added that the liability of States which caused such harm, as well as their compensation obligations, should also be made clear.

58. On the first point, one representative observed that, on the fundamental issue of whether the obligation not to cause appreciable harm should or should not take precedence over the principle of equitable utilization, the Commission's approach was somewhat contradictory and, moreover, failed to take account of historical developments. In his view, the principle of equitable utilization should not be subordinated to the prohibition on causing

appreciable harm because it had originally been introduced in order to modify that prohibition. He added that the draft as it stood appeared to be more favourable to existing utilizations of international watercourses than to possible new ones and that it might be advisable to reverse that order of priorities by reverting to the approach advocated by the International Law Association in 1966. Another representative remarked that in the case of uses not involving pollution, the obligation not to cause appreciable harm should be subject to the principle of equitable utilization.

59. On the second point, some delegations supported the phrase "appreciable harm". The remark was made that eliminating the adjective could impose an intolerable burden on any State wishing to carry out any kind of activity which might have even a minor impact on an international watercourse and that replacing it by a term such as "major" could enable the upstream States to act as they wished without regard for the interests of downstream States unless major harm was likely to ensue. It was also said that, while the word "appreciable" (the Spanish equivalent of which could be sensible) did introduce an element of subjectivity, it provided a threshold that could be set higher or lower depending on whether it was interpreted to mean "significant" or "substantial", for instance.

60. A number of other representatives, however, criticized the adjective "appreciable" which, it was observed, appeared not only in article 7 but also in articles 3, 4, 12, 21, 22, 28 and 32. The term was viewed as vague and ambiguous and likely to lead to misunderstandings between watercourse States, inasmuch as it could mean either "detectable" or "significant". One representative, for instance, stressed that the ambiguity of the word would make it difficult to determine whether harm had been caused. Elaborating on this point, another representative, while acknowledging that the Commission was no doubt seeking to indicate that the issue related to damage on a certain scale and not to a minor and unimportant disruption, even though such a disruption might be perceptible and measurable, noted that the adjective "appreciable" in Spanish as in other languages meant literally "which can be appreciated", that was to say, measurable no matter how minute or insignificant. Several other representatives stressed that the word "appreciable" failed to indicate the gravity or seriousness of the harm and would therefore place an unjustifiably heavy burden on upstream States.

61. Attention was furthermore drawn to the subjective nature of the term "appreciable", which might be exploited by some watercourse States with the intention of disrupting the proper use of an international watercourse by another watercourse State. To illustrate this point, one representative referred to article 12 (Notification concerning planned measures with possible adverse effects), pointing out that if the State which planned to implement the measures did not believe that they might have "an appreciable adverse effect" on another State, it would not provide notification and might in fact cause harm to that State. Various adjectives were proposed as substitutes for the word "appreciable", including "serious", "substantial", "significant" and "considerable".

62. Some representatives furthermore drew attention to issues which a mere change of adjective would leave unresolved. One of them, referring to the difficult problem of responsibility for harm, pointed out that harm could result from an insignificant action by one State which merely compounded the effects of existing harmful uses in another, adding that paragraph (5) of the commentary to article 7 on the term "appreciable harm" should be reflected in the draft article. Another representative, after expressing the view that the basic concept which must be retained should be that the waterway passed from the territory of one State to that of another, and that in such circumstances the upstream State should be vigilant to ensure that there was no important qualitative or quantitative change in the waters, remarked that it might have been better if the Commission had tried to draw a distinction between uses for purposes of consumption and other uses. In his view, it would be logical to stipulate, in the latter case, a total prohibition on the pollution of the watercourse, as part IV of the draft articles did, while in the first case the basic goal should be to ensure rational sharing as it would not be possible to prohibit consumption by the upstream State for such purposes as human consumption and some agricultural and industrial uses.

63. The principle in article 8 was endorsed by some delegations. One of them, however, pointed out that the obligation to cooperate could, in some cases, preclude the optimum utilization of an international watercourse. Another representative felt it unwise to designate optimum utilization of the watercourse as the objective of cooperation. He stressed that optimum utilization was difficult enough to achieve within the territory of one State because of the multiplicity of possible uses and of interests involved and that, in an international context, the difficulty was even greater. In his view, optimum utilization - which, moreover, was not easy to determine objectively - could at most be regarded as a desirable goal, but not as the sole object of cooperation.

64. Article 10 was commented upon by a number of delegations. The principle underlying it was noted with interest and described as vital to the whole draft. The article was furthermore viewed as reflecting the evolution which had taken place over the past century and the fact that watercourses were no longer used mainly for navigation.

65. One representative, on the other hand, questioned the basic approach reflected in the article, pointing out that preference should be given to domestic and agricultural utilization of watercourses. He noted that the existing text was based on the principle that no use of an international watercourse enjoyed inherent priority over other uses and that requirements of vital human needs were mentioned therein merely as the most important factor to be taken into account in the event of conflict between different uses of a watercourse. While acknowledging that the basic principle stated in the article was correctly deduced from State practice, he observed that because of the scarcity of drinking water and the vital importance of water to agriculture, the draft should invite States to accept the principle that domestic and agricultural utilization should have priority. In his opinion, the development of international law in that area was indispensable in view of current population growth.

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66. Comments concerning paragraph 2 of the article included the observation that the phrase "vital human needs" should be given a broad interpretation going beyond the provision of water for drinking or for food production and the remark that the paragraph could be complemented by provisions relating to the procedures necessary to achieve a concrete solution to a dispute such as the obligation to negotiate or the establishment of a system for the peaceful settlement of disputes. Drafting comments on the same paragraph included the remark that the term "pact" in the Spanish version should be broadly construed, or preferably, replaced by the word "acuerdo" which was wider in scope, and the suggestion that the term "custom" be replaced by a reference to established practice or tradition.

67. As regards article 9, the view was expressed that its wording should be more forceful.

4. Comments on part III (Planned measures)

68. Part III gave rise to diverse reactions. Satisfaction was expressed with the Commission's focus on procedural rules, an approach which, it was noted, reflected a concern for the prevention of harm rather than compensation for harm already caused. Part III was furthermore described as "reasonable" (despite the inadequacy of the only means of settlement envisaged for the case where consultations and negotiations failed to produce agreement, namely a moratorium of six months provided for in articles 17 and 18).

69. Part III was on the other hand criticized on two opposite grounds. Some viewed it as more detailed and constraining than was necessary in a framework agreement; more specifically, the remark was made that the provisions concerned would restrain the flexibility that States might find useful in their negotiations. The hope was accordingly expressed that on second reading the Commission would simplify that part of the draft.

70. Other representatives, however, felt that the proposed provisions were too weak. One of them stated that part III should provide for an obligation to undertake studies on the effect which planned measures could have on current and future uses of international watercourses. She then made the following suggestions aimed at reinforcing part III:

(a) Article 12 should not place upon the State implementing the measures the sole responsibility for determining whether such measures could have an appreciable adverse effect on other watercourse States;

(b) Article 17, paragraph 3, could provide for the suspension of the implementation of the planned measures until agreement was reached, with a time-limit set for negotiations; where no solution was reached, recourse would be had to other means of peaceful settlement, and to the courts in the final instance;

(c) The provisions of article 17 containing the amendments suggested above should also apply to article 18, paragraph 2;

(d) In article 18, paragraph 3, the provisions of article 17, paragraph 3, should apply;

(e) The formal declaration referred to in article 19, paragraph 2, should be communicated to all watercourse States to permit each of them to evaluate the extent to which it would be affected;

(f) Provision should be made that, after the urgent situation had passed, the State which had implemented the measures should negotiate with the other watercourse States a definitive solution to the problem: the State which had implemented the measures should also repair the damage which the measures had caused to the other watercourse States;

(g) Any watercourse State, and particularly one that had been notified, should have the right to inspect the work being implemented in order to determine whether it corresponded to the project that had been proposed.

71. Another representative, while noting with satisfaction that the provisions on planned measures were purely procedural in nature and did not affect the substantive legal position even in cases where the notified State failed to react to the notification of the notifying State within the prescribed period of time (an approach seemingly different from that taken by the Special Rapporteur for the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in his sixth report), observed that part III did not go as far as the Convention on Environmental Impact Assessment in a Transboundary Context concluded at Espoo, Finland, on 25 February 1991. He observed that while part III appeared to provide for equitable treatment of all States using an international watercourse, the notification provisions did not require the notifying State to undertake an environmental impact assessment, in which the notified State could participate, before a final decision on the implementation of planned measures was taken - a requirement which was included in the Espoo Convention. He further remarked that the Espoo Convention went further than the Commission's draft in respect of the rights accorded to the public, in that it not only prohibited discrimination between the public in the State of origin and in the affected State but also required the State of origin to ensure that the public in the affected State could participate in the environmental impact assessment procedure; it also made it obligatory for the State of origin to provide the public of the affected State with possibilities for making comments on, or objections to, the planned measures, as well as with the necessary environmental impact assessment documentation. The same representative, on the other hand, pointed out that the position of a State not notified in accordance with draft article 12 seemed stronger than that of the potentially affected State which had received no notification under the Espoo Convention.

72. Other comments on part III included the remark that the consultations and negotiations provided for in article 18, paragraph 2, would presumably not be restricted to the question as to whether notification was required but would also deal with the planned measures' compatibility with the principle of equitable and reasonable utilization set forth in article 5 and the prohibition on causing appreciable harm set forth in article 7.

5. Comments on part IV (Protection and preservation)

73. Attention was drawn to the complexity of the problem of pollution resulting from the immense growth in industrialization, transportation and the use of highly toxic substances. It was recalled that the international community had expressed its great concern to ensure that waste disposal and other watercourse activities did not impair the quality of water - which highlighted the need for States to take the necessary steps to prevent pollution.

74. The articles in part IV of the draft were described as generally satisfactory. The view was however expressed that they needed to be further developed and that their wording should be more forceful. Thus, some representatives said that provision should be made for the establishment of environmental standards, and that the draft articles should require States to undertake environmental impact assessments prior to the implementation of any measure and to communicate the results to the other watercourse States without delay. One of them further suggested to include the principle of non-discrimination with respect to the environment - which meant that watercourse States should not make distinctions between their environment and the environment of other watercourse States in elaborating and implementing legislation on the prevention and abatement of pollution - and to provide in the draft articles that a State which polluted an international watercourse should incur liability. The same representative also recommended that States be barred from invoking immunity from jurisdiction in cases of harm caused by the use of an international watercourse and that a procedure for the peaceful settlement of disputes be established.

75. One representative noted that article 20 was particularly stringent in that it made no mention of possible appreciable harm to other watercourse States. He remarked that a question which might arise in that connection was how article 20 was related to articles 21 and 22, both of which were phrased in less stringent terms.

76. Referring to article 21, one representative suggested that the riparian States should have the right to receive information on any activities of other riparian States which could affect water quality in an international watercourse and that an international mechanism should be developed to monitor the pollution level of international watercourses and to suggest remedial measures to the riparian States concerned. He further remarked that to protect and preserve ecosystems, not only contamination but also the drying up or diversion of international watercourses should be strictly prohibited.

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Another remark was that problems might arise with regard to the proper relationship between the provision on water pollution in article 21 and that in article 24, which obliged watercourse States to take measures to prevent or mitigate conditions that might be harmful to other watercourse States, whether resulting from natural causes or human conduct.

77. As regards article 22, one representative noted that the proposed text gave the impression that the introduction of such species was prohibited only if it caused harm to other watercourse States and not if it was detrimental to the ecosystem of the watercourse itself.

78. Drafting comments on provisions in part IV included the remark that, in article 20 and in article 21, paragraph 2, the word "and" should be substituted for the word "or", so that the protection would be both individual and joint.

6. Comments on part V (Harmful conditions and emergency situations)

79. One representative, while having no substantial problem with that part of the draft, felt that it could be made more precise through careful redrafting.

7. Comments on part VI (Miscellaneous provisions)

80. Referring to the general approach to management and regulation reflected in this part of the draft, one representative noted that in recent years there had been increased cooperation among watercourse States for the optimal utilization, management and protection of international watercourses. Another representative stressed that cooperation in these areas was essential for States, adding that consultations and cooperation could result from an initiative taken by any one of the watercourse States. A third representative, after indicating that he supported the establishment of broad cooperation between States in order to protect water resources and to ensure the security of watercourse installations, stressed the need to take into account the common and individual interests of watercourse States, for instance, in the framework of joint commissions of riparian States in order to solve problems when they arose. He further pointed out that the introduction of joint management of a watercourse, unlike agreement on the individual management by each State of its portion of the watercourse, would require in each instance the conclusion of a specific agreement.

81. The thrust of articles 26, 27 and 28 which, one representative observed, could be moved into a separate part since they were all related, was considered as satisfactory by some representatives, one of whom viewed them as acceptable as long as they formed part of a draft framework agreement. The remark was made that the provisions in question took into account the practice of States, recommendations made by relevant international conferences and existing regulatory conventions and that there was nothing in them which

particularly infringed upon the sovereignty of watercourse States. It was also said that the articles in question appeared to strike a reasonable balance between the interests of upstream and downstream watercourse States, even though institutional arrangements for permanent or regular cooperation between watercourse States were only mentioned in article 26 on management (which did not make the establishment of a joint management mechanism obligatory), and that the draft articles as a whole were rather weak in this respect.

82. Reservations were, however, expressed on the three draft articles which, it was stated, were not consonant with the framework agreement approach advocated by the Special Rapporteur and trespassed on the discretion of States. One representative, although considering the provisions in question a remarkable achievement on the part of the Commission, felt that more consideration should be given to the scope of articles 5 and 6 which were clearly logically linked with the said provisions.

83. Article 26 was commented upon by several representatives. One representative congratulated the Commission for ridding it of its formalism. Another representative, while agreeing that the term "mechanism" was preferable to "organization" since it provided for less formal means of management, observed that the need for management of international watercourses on an agreed basis could not be overemphasized, and that the consultations and cooperation between watercourse States provided for in the article were important. He added however that in the event of a conflict of socio-economic interests between watercourse States, the concept of consultation as envisaged by the Special Rapporteur should also include an obligation to negotiate in order to reach a just and equitable solution. He concluded that article 26 could be improved and required further consideration by the Commission. Still another representative drew attention to the precedent established by the 1909 Treaty between Canada and the United States relating to boundary waters, which had led to the establishment of the International Joint Commission and which, in his view, other States might well emulate. He remarked that while political differences might make it impossible to establish joint management systems for all States interested in a particular international watercourse, such a system would seem to be appropriate for the efficient fulfilment of such obligations as those embodied in articles 6, 8, 9 and 10 and in part III. Indeed, he further noted, it might be desirable to involve in joint management all States which had an interest in or which might be affected by the actions of watercourse States.

84. With regard to article 27, one representative questioned whether it could be taken as a principle that every watercourse needed regulation and that regulation itself could only be managed jointly by the watercourse States. He stressed that the regulation of flows could, on the face of it, be governed by the general provisions on watercourse agreements (art. 3 and 4), regular exchange of data and information (art. 9) and notification of planned measures (arts. 11 to 19) and that the only obligation that seemed to be justified was the obligation to notify other watercourse States and to agree to consultations when there might be repercussions on other States.

85. Other representatives supported the article as a useful factor in risk prevention and optimizing the potential of a watercourse, although some felt that it did not go far enough. One of them emphasized the importance of the regulation of international watercourses and the need for cooperation between States in that field, both to prevent dangers such as floods and erosion and to maximize the benefits that might be obtained from the watercourse for the watercourse States on a just and equitable basis without any significant change in the flow of water to the lower riparian State. In his view, there was a need to discuss article 27 further with a view to its elaboration. Another representative, after noting with satisfaction that paragraph 3 addressed the concerns which his delegation had previously expressed as to the need for clarification of the term "regulation", felt that paragraph 2 did not go far enough. He suggested that the Commission should consider other means of giving effect to the obligation to cooperate, namely, through bilateral, regional or international organizations, thus providing for situations in which political realities did not allow for direct cooperation between States.

86. Article 28 elicited support on the part of several delegations, which pointed out that the obligation in paragraph 1 and the consultations mandated in paragraph 2 were important in regulating international watercourses.

87. Other representatives, however, felt that the article should be strengthened. One of them indicated that States should be under an obligation not only to prevent contamination of water resources but also to prohibit any efforts to cut the water supply of watercourse States, dry up springs or divert rivers from their course. He added that the liability for such wilful or negligent acts must be a strict liability so that the State responsible for causing harm to other watercourse States was made liable for the consequent damage. Another representative, after noting that the present text merely called on States to enter into consultations with regard to the safe operation or maintenance and the protection of watercourse installations, insisted that the article should clearly establish the duty of watercourse States to use their best efforts to maintain and to protect such facilities from natural hazards or from wilful or negligent acts.

88. As for article 29, it was supported by some delegations. One of them welcomed the inclusion therein of a reference to the rules of international law governing armed conflicts. Others pointed out that the article reflected the principles and norms of international law that were applicable in such circumstances, particularly the general principle on which the "Martens clause" was based. One representative, however, felt that the article should be couched in the form an obligation of watercourse States to do their utmost to maintain and protect international watercourses and related installations, facilities and other works.

89. Referring to paragraph (3) of the commentary to the article, one representative expressed reservations on the statement that "the present articles themselves remain in effect even in time of armed conflict" - a far-reaching conclusion which he considered difficult to accept in respect of all the draft articles. In his opinion, only the provisions concerning the

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protection and preservation of the ecosystems of international watercourses had some chances of remaining operative in time of war, and all the provisions on inter-State cooperation between the belligerents would necessarily be considered suspended.

90. Article 32 gave rise to divergent views. Several delegations considered it adequate inasmuch as it reaffirmed a basic principle in the area of justice and protection of the rights of injured parties which was contained in bilateral conventions on the protection of the environment. One of them, however, felt that the article should be placed in part II.

91. Other representatives expressed reservations on the article. One of them viewed it as unnecessary and another expressed serious doubts about it. After pointing out that the present text referred to harm suffered in general as a result of activities related to an international watercourse instead of dealing only with harm suffered in another State, he remarked that there seemed to be no valid reason to state the principle of discrimination in such general terms and that the question of non-discrimination in access to judicial procedures had a cogency of its own and was not limited to cases involving international watercourses. He noted that, at the same time, there was no mention whatsoever of the application of non-discrimination to harm suffered in another State, adding that the procedural right of access to judicial proceedings was meaningless if no substantial right was recognized. In his view, such a right to compensation or other remedies when the harm was suffered in another State would be essential if the principle of non-discrimination was to be effectively observed, and the harm caused in another State as a result of activities related to an international watercourse should be equated to a similar harm caused in a State where the activity was conducted, both in terms of substantive rights to compensation or other remedies, and in terms of procedural rights of access to courts.

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C. DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND 8/

1. General comments on the draft Code

92. Many delegations expressed satisfaction over the completion by the Commission on first reading of the draft Code of Crimes against the Peace and Security of Mankind and praised the work of the Special Rapporteur.

93. Other delegations, while also complimenting the Commission and the Special Rapporteur, expressed doubts and reservations about the current draft, pointing out that a number of fundamental questions remained unresolved. The point was made in this connection that the Commission had been eager to complete the first reading of the draft Code rapidly in order to facilitate the task of Governments, so that the text arrived at was not a finished piece of work but an outline giving States an idea of what the Code would be. Attention was drawn in this context to paragraph 173 of the Commission's report, where it was recognized that the draft was open to some improvements which could be made on second reading, with the benefit of further points made in the comments and observations by Governments.

94. Many delegations emphasized the importance and usefulness of the draft Code, describing it as an important milestone in the Commission's work in general and on this topic in particular and as an instrument for strengthening the rule of law and for combating the most dangerous attacks on international peace and security, such as aggression, genocide, drug trafficking, etc., which had a severe impact on entire communities and mankind as a whole. It was stressed that most of the provisions of the Code were only a reflection of generally binding customary rules of international law, having in some cases a jus cogens character, and that the adoption of these provisions on first reading marked a major step towards the progressive development of international law and constituted a highlight of the United Nations Decade of International Law.

95. More specifically, one representative noted that the importance of international criminal law was universally recognized and that its development was an important contribution to the maintenance of international peace and security. He consequently observed that, in order to be of real value, the draft Code should add something to the existing law and that the work of the Commission was a constructive effort in that direction.

96. Another representative, while acknowledging that the International Law Commission had first taken up the draft Code of Crimes against the Peace and Security of Mankind in 1947 and that the time gap since then highlighted the

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8/ A number of representatives announced their Governments' intention to submit detailed written comments before 1 January 1993, as requested by the Commission in paragraph 174 of its report.

difficulty of achieving consensus on the composition of substantive offences and on procedural and related questions, remarked that, in the light of increased international cooperation in the post-cold war era and the threat to all States caused by the most serious international offences, the time was ripe for a major effort to produce a workable scheme which would deter prospective perpetrators and, if not, ensure prosecution and punishment in accordance with the rule of law.

97. Still another representative, after recalling that during the 40 years of the consideration of the item doubts had been raised as to the need for and feasibility of the draft Code, either because the crimes in question were already covered by peremptory norms of international law, by rules of general international law or by rules established in international agreements or simply because international crimes did not exist, pointed out that, in the light of such developments as the establishment by the Nürnberg Tribunal of the international responsibility of individuals for crimes under international law, it could not be maintained that international crimes did not exist. He added that the draft Code was needed for the purposes of progress and certainty as to the law: progress in the incorporation of other fundamental areas, and certainty in guaranteeing due process and safeguarding the principles of human rights on which contemporary criminal law was based, the last point being of vital importance with respect to the draft Code.

98. Other representatives recommended a prudent approach to the topic. Some cautioned against an excessively hasty and overambitious attempt at drafting and wondered whether it was realistic to believe that, once adopted, the Code would be implemented by States and not remain a dead letter. Emphasis was placed in this context on the responsibility of the Commission and of the Sixth Committee. The latter was invited to bear in mind the political implications of the topic for each country and the need to prepare rules that were truly meaningful and would function effectively in the contemporary world, which had seen tremendous changes since the immediate post-war era. As for the Sixth Committee, it was urged to answer the questions raised in connection with the Code inasmuch as it bore responsibility for determining the focus of the Commission's work and for the outcome of codification endeavours.

99. Concern was expressed that the hasty drafting of an international code for the punishment of offenders might not only be futile but also destabilize existing customary international law and even jeopardize the existing legal structure. In this connection, one representative noted that in the areas of criminality dealt with by the Code there was already a body of international criminal law, laid down in more or less widely accepted multilateral treaties, which relied on national courts and institutions for prosecution and punishment, with international cooperation limited to the extradition of suspected offenders and to judicial assistance. He remarked that, as shown by a wide range of cases, such national legal institutions appeared to be working fairly well and that, where they were not, the appropriate course was to reform them, not to duplicate them at the international level, which would be immensely expensive and complex.

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100. Analysing the needs which the draft Code was intended to serve, one representative identified (1) the need for a range of internationally acceptable definitions of crimes which were inherently or substantially international in character, and which were crimes against the peace and security of mankind; (2) the need for international assistance in dealing with criminals, such as international drug traffickers, who had sufficient resources to put them beyond the reach of a small and isolated criminal justice system; and (3) the necessity of punishing major war criminals, individuals whose offences were on such a scale or who had caused such injury that international action against them was the best way of responding and of ensuring a fair trial. He pointed out, with respect to the first of the above-mentioned needs, that the Code overlapped with and repeated internationally agreed definitions of offences already dealt with in international conventions, and that it was unclear how States parties to the Code would reconcile their obligations under the multilateral treaties to which they were already parties with their obligations under the Code. He added that the Code did not deal with all aspects of offences referred to in multilateral treaties and that, while many of the offences included in the Code were the subject of multilateral conventions, piracy and hijacking, for example, had been excluded without explanation, although those crimes could affect the peace and security of mankind.

101. As regards the second of the above-mentioned needs, the same representative, while sympathetic to the problem faced by some States, especially smaller States, in bringing to trial major drug traffickers and other organized criminals, questioned whether the draft Code was the best way of dealing with it. He suggested as one alternative to set up a regional jurisdiction with cooperative arrangements, for example, in sentencing and mentioned in this context the Pacific Court of Appeal.

102. As for the third need, the same representative, while recognizing that it was a real one inasmuch as it was contrary to the rule of law to create, through retrospective treaties, institutions and rules to deal with special cases, wondered if it was of so pressing a character as to justify the associated costs and efforts. He furthermore observed that if such was the purpose of the Code, only the most serious international crimes should fall within its ambit, and that any international institution created to give effect to its provisions should not be a standing tribunal with permanent staff, because it would have relatively few cases, but a structure capable of functioning when the need arose.

103. He summed up his position by stating that the draft Code satisfied none of the possible purposes to which he had referred: it was not a comprehensive statement of the jus gentium in the area of criminal law, nor was it always consistent with the existing international criminal law conventions; it did little to deal with the special problem of drug trafficking and organized crime identified by some States; and it was overly inclusive in identifying the most serious cases of international criminality, as well as vague in some definitions. In his view, the draft Code was neither a statement of principle nor an instrument of treaty status capable of implementation by States parties.

104. Among the delegations advocating a prudent approach to future work of the draft Code, some suggested that consideration be given, for instance, to elaborating a code of conduct as a first step, with a view to working out binding rules at a later stage.

2. Comments on parts I and II in general and on specific articles

105. The structure in two parts adopted on first reading was viewed by several delegations as sound, simple and precise.

Part I

106. This part was viewed as particularly important in that jurists must also be involved in formulating the principles underlying the law.

Article 1. Definition

107. Several delegations favoured the deletion of the square brackets around the words "under international law". In their view, the wording of article 2 made it sufficiently clear that crimes against the peace and security of mankind were indeed crimes under international law.

108. One delegation furthermore pointed out that article 1, as currently drafted, could be interpreted as excluding the existence of crimes under international law other than those defined in the Code and that the definition in article 1 should be brought into line with article 10 on non-retroactivity, which assumed the existence of crimes under international law without reference to the Code.

Article 2. Characterization

109. Comments on the article included the remark that its nature and scope should be more clearly defined and the observation that the wording should be improved so that internal law and international law could be better harmonized.

110. On the other hand, the article was described as constituting a clear message to national judges and embodying the most widely accepted doctrine on the matter.

Article 3. Responsibility and punishment

111. Some representatives held the view that the article was rightly confined to individual responsibility. One of them remarked that involving State responsibility would mean defining a regime which, because it was quite

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different from that envisaged for entailing the responsibility of the individual, could not be encompassed by the draft Code. Another pointed out that under the draft States could still be liable for reparations within the context of the international responsibility of States, as noted in article 5. A third representative similarly noted that the approach adopted by the Commission by no means disregarded the dual nature of the issue: that a crime committed by a physical person could at the same time constitute an illicit act by the State. In his view, however, it was only by separating the criminal responsibility of individuals from the responsibility of States that the complex subject-matter in question could be dealt with and codified.

112. Other representatives did not unreservedly endorse the present scope of the article. One of them, while accepting that at the current stage it was better for the Commission to postpone consideration of the international criminal responsibility of States, maintained that crimes against the peace and security of mankind could be committed by States. Another representative felt that the draft article should also make reference to the responsibility inherent in acts endangering relations between States committed with the direct or indirect participation of a State. The view was also expressed that article 3 should mention the responsibility of organizations involved in a crime against the peace and security of mankind. In this connection, one delegation observed that even if the individuals who were part of the company would themselves be liable for any act committed on the company's behalf which constituted a breach of the Code, there were none the less situations where it would be useful to proceed against the company as such as well as its individual directors or shareholders and that in such cases the articles on penalties should provide for fines and other kinds of sanctions appropriate for a company.

113. With reference to paragraph 2, the remark was made that the commission of an illegal and reprehensible act that so harmed the social order that it became punishable could involve various degrees of participation, a fact which was recognized in the internal law of many countries and was also acknowledged in article 3.

114. The general approach reflected in the paragraph was however criticized by some representatives. One of them pointed out that it gave rise to a methodological problem in that complicity must be differentiated by taking into account the specific features of the crime itself, according to the qualifications stipulated in the Code - a remark which also applied to attempt. Another representative suggested that abetment be dealt with in a separate article. In his view abetment was an offence in itself, like conspiracy and attempt, and in criminal law those offences did not come within the purview of complicity.

115. Other comments on paragraph 2 included the remark that the word "directly" should be deleted so as to make the provision more general and the suggestion that some terms such as "knowingly" or "intentionally" be added in the first line in order to avoid the prosecution of individuals who aided or abetted a crime unknowingly or unintentionally - a result which could also be achieved through the inclusion in the draft Code of the general concept of criminal intent.

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116. Referring to the commentary to paragraph 2, one representative pointed out that complicity could cover situations where help was given ex post facto in the absence of an agreement prior to the perpetration of a crime, provided that the person giving the help knew that a crime under the Code had been committed. He added that the special circumstances relating to such a person could be taken into account in sentencing.

117. As regards paragraph 3, one representative felt that attempt should not be made punishable under the Code. He remarked that it would be difficult to justify, for example, the punishment of an attempt to commit a threat of aggression. The prevailing view was however that the draft Code rightly provided for the possibility of punishing attempts to commit a crime against the peace and security of mankind; for some representatives, however, such a possibility should extend to all crimes in view of their gravity - an approach reflected in the 1954 draft - while, for others, a few crimes should be excepted.

118. One representative felt that the paragraph lacked an indication to the effect that any attempt to commit a crime under circumstances which, objectively, could not lead to the actual commission of the crime would not entail criminal responsibility. Another representative, however, considered as redundant the third of the four criteria mentioned in the commentary - namely impossibility of performance - on the ground that as long as there was an intention to commit the crime and a step had been taken to carry it out, the responsibility for performance was immaterial. The same representative, referring to the fourth element identified in the commentary, namely non-completion of the crime for reasons independent of the perpetrator's will, asked whether that criterion implied that an attempt had not been made if the perpetrator had had a change of heart. He questioned whether it was absolutely necessary to define the term "attempt" which, in the absence of commission, might appropriately be left to judicial interpretation and case-law.

119. Regarding the title of the article, the question was asked whether the word "sanction" in the French text was really the equivalent of the term "punishment".

Article 4. Motives

120. Some representatives supported the draft article, which was described by one of them as very important, since it was essential to specify that there were types of behaviour (acts or omissions) that were by their very nature utterly abhorrent, whatever the motives invoked by the accused and not covered by the definition of the crime.

121. Other representatives expressed reservations on the article on opposite grounds. Thus, while one representative felt that the motives that had inspired a person accused of a crime against the peace and security of mankind were not irrelevant and could be taken into account in determining the

penalty, another, while thinking that the idea contained in the draft article was correct, felt that its wording should be improved by making it clear that the crimes covered by the Code could not be deemed political or politically related crimes; he observed that, otherwise, some interpretations might prevent the extradition or trial of persons subject to the jurisdiction of a State.

122. A third trend favoured the elimination of the article, which was viewed as a potential source of confusion. Thus, one representative stressed that, by definition, motive was not one of the constituent elements of a crime, even if in certain cases, such as genocide, the intention to destroy a racial group was closely linked to a racist motive. He suggested that motive be taken into consideration by making room for extenuating or aggravating circumstances.

Article 5. Responsibility of States

123. Some delegations stressed the importance of the article, which, as one of them put it, was justified because, in view of the principle that only an individual could be criminally responsible for a crime against the peace and security of mankind, it was necessary to establish that that responsibility in no way excluded the responsibility of the State for internationally wrongful acts.

124. Some delegations, while supporting the draft article, felt that additional elements should be included therein. Thus, one representative suggested that it be specified that the commission of a crime by agents of a State acting in their official capacity entailed the responsibility of that State, or, in the words of another representative, that responsibility was linked to liability for reparation. It was furthermore suggested that a clause be included whereby the international responsibility of States might be reduced by domestic prosecution of international crimes.

125. As regards the title of the article, the remark was made that since the draft Code dealt separately with individual and State responsibility, the current wording should be altered to remove ambiguity.

Article 6. Obligation to try or extradite

126. Article 6, embodying the principle aut dedere aut judicare, was described as an essential part of the system created by the Code inasmuch as it was primarily for States to prosecute crimes against the peace and security of mankind. The alternative of trial by the requested State instead of extradition to the requesting State was viewed as well established in several conventions and as workable in practice in view of the progress made in respect of reciprocal judicial assistance which should make it easier for national courts to overcome the obstacles encountered in establishing facts and assembling evidence.

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127. While endorsing the principle, some representatives drew attention to its limits. Thus one representative pointed out that the alternative of trial or extradition might be less appropriate when the request was for extradition to an international jurisdiction recognized by the requested State. The same representative, after observing that the obligation to extradite inevitably focused attention on the safeguards of the rights of the accused in the jurisdiction to which he was to be extradited, stressed that the acceptability of the obligation to extradite, and thus of the international jurisdiction if established, would be heavily dependent on the adequacy of such safeguards. Another representative felt that the principle should not be couched in imperative terms bearing in mind the existence of bilateral and multilateral treaties on the issue. She reserved the sovereign right of her country to agree to the extradition of an alleged criminal in accordance with its legislation and the bilateral agreements it had concluded on the matter.

128. Specific comments were addressed to paragraphs 1 and 3 of the article.

129. One representative pointed out that the current wording of paragraph 1 overlooked the wording in the multilateral anti-terrorism conventions. He pointed out that many States would only be able to agree to the type of obligation embodied in the paragraph if it met the concerns and demands of their domestic criminal law processes. While restating his country's commitment to the prosecution and punishment of the most serious international crimes that caused irreparable harm to the international and national rules of law, he suggested that the word "try" must be replaced by language that took into account evidentiary requirements and that, following the model of the multilateral anti-terrorism conventions, paragraph 1 provide for an obligation either to extradite or to submit the case to a State's competent authorities for the purposes of prosecution.

130. Some representatives furthermore felt that paragraph 1 required further elaboration. Thus one representative suggested to state that the offences contained in the draft Code were to be considered as extraditable offences between States parties which had bilateral extradition treaties and that the draft Code could be used as a vehicle for extradition between those States whose domestic law required a bilateral treaty, where one was not in existence. He added that consideration should also be given to whether the political character of the offence as an exception to extradition should be explicitly excluded, or whether it was sufficient to have a general provision as contained in article 4, supplemented by the obligation aut dedere aut judicare. Another representative suggested to add in paragraph 1 the following sentence: "If extradition is refused, the requested State shall try the alleged perpetrator as if the act had been committed under the jurisdiction of that State." That delegation believed that although that point could be inferred from paragraph 1, it must be stated clearly in order to avoid failure to prosecute due to differences of interpretation or to rules prohibiting extradition.

131. As regards paragraph 3, one representative said that it could not be interpreted as conferring on the international criminal court a competence

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which might challenge the sovereign right of States to try on their territory the perpetrators of crimes which, while falling within the scope of the Code, would also be punishable under national legislation.

Article 7. Non-applicability of statutory limitations

132. Several representatives endorsed the draft article which, it was observed, was consistent with the 1968 Convention on the subject. One of them, while noting that rules on statutory limitations were included in the various criminal codes, mainly to guard against miscarriages of justice when evidence became unreliable with the passage of time, pointed out that many countries did not apply statutory limitations to the most serious crimes and that article 7 was therefore justifiable in view of the gravity and the heinous nature of the crimes to be prosecuted under the Code. He added that it would be for the court to assess carefully whether the value of evidence produced long after the event might have been affected by the lapse of time.

133. At the same time, attention was drawn to differences between national legislations in this respect and to the fact that legal disputes had arisen on the point because the laws of some countries provided statutory limitations.

Article 8. Judicial guarantees

134. This article was viewed as essential to the normal, sound operation of the procedure envisaged.

135. With a view to improving the current wording, one representative suggested to include in the first sentence an express reference to the minimum guarantees of "due process" due to all human beings, and to reformulate the end of the sentence to read "the evaluation of the facts and of points of law". He further favoured a mention of the presumption of innocence and proof of guilt as principles of trial procedure and of guilt as a principle of criminal conviction, which would make it unnecessary to refer, in the case of each crime, to intent, guilt or premeditation as necessary elements for conviction. He suggested to supplement the list of legal guarantees with references to, at least, the right of appeal and compensation for judicial error, for those two guarantees were included in article 14 of the International Covenant on Civil and Political Rights. He also recommended the inclusion of a subparagraph establishing the right to other legal guarantees in accordance with "the general principles of law recognized by civilized nations", a phrase borrowed from Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. He summed up his position by stating that the scope of the Code and the severity of its penalties should be matched by the strongest possible legal guarantees and by a system to ensure application of the principles of res judicata and non bis in idem, adding that without such guarantees and without an international criminal court, the exceptions to the principle of non bis in idem contained in article 9 would appear to him to be excessively broad.

Article 9. Non bis in idem

136. While the rule non bis in idem was viewed as an essential part of any criminal code, and while article 9 was generally supported, several delegations felt that the current wording called for improvement. One of them said that the provision would gain by being tightened during the review of the draft article, and not only in the context of the establishment of an international criminal court. Another delegation pointed out that the draft article should be clarified from a conceptual point of view so as to facilitate its implementation. In this context, the remark was made that the current wording risked producing inaccurate interpretations, particularly paragraph 3.

137. Other more specific comments included the remark that paragraphs 1 and 2 should be combined and the expression "an international criminal court" replaced by "a competent court", and the observation that, aside from being inconsistent with the legal philosophy of article 2, the text was confusing and did not set out clearly a conflict of competence between internal and international jurisdiction.

Article 10. Non-retroactivity

138. The view was expressed that paragraph 2 should be rethought, for such a broad exception would undermine one of the main virtues of the draft Code - the guarantee of certainty as to the law and of the principle of nullum crimen sine lege. It was suggested to include language to the effect that on the entry into force of the Code no one should be convicted of an international crime in the States in which it was applicable except in respect of the acts which the Code or other international agreements expressly defined as punishable.

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Article 11. Order of a Government or a superior

139. Support was expressed for the current wording of the draft article, although the words "if, in the circumstances at the time, it was possible for him not to comply with that order" were viewed as calling for more detailed study. One delegation warned that such a broad formulation risked undermining the Code. Another delegation, while being inclined to agree in principle with the reasoning set forth in the commentary to the draft article that in order to incur criminal responsibility a subordinate must have had a choice in the matter and a genuine possibility, in the circumstances at the time, of not carrying out the order, observed that in practice it might prove extremely difficult to assess objectively whether, in the circumstances at the time, it was possible for the subordinate not to comply with the order. Although sharing the view that an exception formulated too broadly might entail the risk of undermining the Code, he pointed out that no one could reasonably be expected to embrace martyrdom.

140. On the other hand, the view was expressed that the article should go further and oblige individuals not to obey a Government or superior that ordered them to commit a crime against the peace and security of mankind, even if they risked punishment for disobedience. The remark was made that if the law could require people to risk their lives to satisfy the ambitions of their Governments, it should also be possible to establish rules that would threaten their security for a just cause.

Article 13. Official position and responsibility

141. This article was viewed by one delegation as going beyond acceptable limits, and by another as being very debatable, in view of the practice of some States that showed little respect for the principle of *jus cogens*.

Article 14. Defences and extenuating circumstances

142. This article gave rise to a number of criticisms. One representative questioned the presence of such a provision in part I. In his view, defences and extenuating circumstances should be used only in a limited manner in accordance with the nature of each crime and should therefore be dealt with separately in the articles devoted to specific crimes.

143. Some representatives further objected to the inclusion in a single article of two concepts as different as defences and extenuating circumstances - an approach which was viewed as unjustifiable even on a provisional basis. The remark was made in this context that defences were a question of responsibility, or of attributability, while extenuating circumstances came into play in determining the penalty once responsibility had been attributed. Thus, it was stated, there should be two articles which would not necessarily be consecutive.

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144. As regards defences, the Commission was invited to give careful consideration to circumstances which precluded incrimination, as oversimplification was liable to give rise to difficulties of implementation. More specific comments were made on the identification of defences and on their effects. As regards the first point, it was suggested to include an exhaustive list of defences, as the reference to general principles of law was not sufficiently clear. In this context, one representative mentioned mental incapacity as a defence worthy of being taken into consideration. Another representative felt that it would be prudent to identify in the article those defences which were excluded by the Code, for example under articles 7 and 11. As for the effects of defences, it was suggested to reword the current text so as to attenuate their absolving nature.

145. The inclusion of an exhaustive list of extenuating circumstances was similarly advocated, as was also a clarification of their effects. In the latter respect, it was suggested to state, for instance, that the court could reduce the minimum penalty in the light of extenuating circumstances, as the court might otherwise find it very difficult to decide whether to convict. Here too, some representatives advocated a restrictive approach to extenuating circumstances.

146. One representative noted that article 14 made the mistake of omitting aggravating circumstances. He pointed out that even though the crimes were all extremely serious, there was no justification for the omission of aggravating circumstances, unless there was to be a single, non-extendable penalty.

Part II (Crimes against the peace and security of mankind)

147. A number of delegations supported the decision taken by the Commission to dispense with the distinction between crimes against peace, crimes against humanity and war crimes. It was said, inter alia, that the abandonment of this distinction did not seem to have any consequences for the substance of the Code and that the discussion of doctrinal differences on that point would bring no benefit and only delay approval of the Code.

148. The scope of the draft Code ratione materiae as it results from part II of the draft met with the approval of some delegations. Thus one representative, while recognizing the need to confine the Code to only those crimes which seriously violated the fundamental legal values of the international community (peace, human rights, humanitarian law in armed conflicts, the independence and sovereignty of nations, the right of peoples to self-determination, environmental protection, health, etc.), stressed that the draft Code sought to protect those values and that it could not be argued that the acts defined therein should not be condemned. He added that the criterion should not be the link with a State but rather the seriousness or scope and systematic nature of the crime.

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149. Other delegations however felt that the list of crimes covered by the current draft was too broad. Four criteria were mentioned as important to bear in mind in defining the scope of the Code ratione materiae. The first criterion was that of gravity. It was recalled that the Code had originally been envisaged as an instrument for the prosecution of the most revolting and atrocious criminal acts and that the idea behind it was not to codify certain particularly serious acts prohibited under international law but to permit the prosecution and punishment of the perpetrators of crimes that were of such gravity that they affected mankind as a whole. Along the same lines, one delegation held that crimes against the peace and security of mankind must be characterized by a special degree of horror and barbarity and be of such a nature as to truly undermine the foundations of human society. Another delegation referred to crimes which conflicted with fundamental humanitarian principles, with "the conscience of mankind", and a third delegation singled out exceptionally grave and heinous acts involving a high level of moral and criminal guilt. In the view of these delegations, the current draft covered acts which did not meet the criterion of exceptional gravity, with the unfortunate result that the concept of a crime against the peace and security of mankind was devalued. Among the crimes which did not qualify as threats to the peace and security of mankind, one representative singled out illicit traffic in narcotic drugs and persecution on cultural grounds.

150. A second criterion which the delegations concerned felt should be borne in mind in identifying crimes against the peace and security of mankind related to their link with the system of international enforcement envisaged. More specifically, the view was expressed that an international enforcement system should not be sought automatically whenever national enforcement problems arose or were likely to arise and that only those crimes which, by that very nature, virtually precluded national enforcement should be eligible. The remark was made in this context that it would be especially difficult to establish an international mechanism for the punishment of extremely diverse acts and that if such an international mechanism was to become effective and workable the Code must be confined to acts which in general international practice were unequivocally regarded as crimes against humanity.

151. A third criterion related to the need to characterize crimes against the peace and security of mankind not in terms of political and subjective considerations, but in terms of the general legal interest of the overall international community. Thus one representative stressed that, given the diversity of international documents and the varying legal force of such instruments, one had to be wary of characterizing as crimes in the legal sense acts which hitherto, had been regarded solely in political terms. Another representative remarked that it would be unwise to consider failure to respect rules established in treaties or resolutions of the General Assembly of the United Nations as systematically constituting a crime against the peace and security of mankind, for that would distort the scope of the draft Code and entail interference with matters dealt with elsewhere, such as damage to the environment and war crimes.

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152. A fourth criterion which was mentioned concerned the need for a link between the crime and a particular State. The view was expressed in this connection that the Code should only include crimes which related to acts perpetrated by individuals in their official capacity. Comments relevant to this issue are to be found in paragraphs 154 to 156 below concerning the scope of the Code ratione personae and under article 3 above.

153. Other comments concerning the scope of the Code ratione materiae included the remark that crimes against the rights of indigenous peoples should be covered and the observation that the list of crimes should remain open so as to make it possible to include in the list other crimes or offences which might materialize in the future. The view was expressed that the list had to be non-exhaustive if the draft Code was to be responsive to any new and as yet unanticipated dimension of crimes.

154. As regards the scope of the Code ratione personae, it was noted that the Commission had adopted a standard format for identifying the persons to whom responsibility for each of the crimes listed in the Code could be ascribed and had worked out three types of solutions depending on the nature of the crimes concerned: (a) crimes which were always committed by, or on orders from, individuals occupying the highest decision-making positions in the political or military apparatus of the State or in its financial or economic life (leaders or organizers); (b) crimes which would come under the Code whenever agents or representatives of a State were involved therein; and (c) crimes which would be punishable under the Code by whoever had committed them.

155. Some delegations, while recognizing the efforts of the Commission in this area and the difficulties involved, expressed reservations or doubts about some of the solutions proposed. Thus one representative said that his country would need to look at this approach very carefully in order to satisfy itself that such distinctions were valid and practical. Another representative questioned the usefulness of dividing offenders into three groups and of distinguishing between persons who were leaders or organizers and persons who were not. He wondered whether it was appropriate to have restrictive provisions in the Code identifying the kind of individuals capable of committing a crime under the Code and suggested that the question might best be settled by means of the development of case-law by an international criminal court. While agreeing that the Code should apply not only to those who committed the acts but also to those who ordered others to commit them, he wondered whether a provision of this nature was in fact necessary, since it could be argued that a person who ordered the commission of a crime under the Code fell into the category of an individual aiding and abetting under article 3, paragraph 2. Still another representative, while agreeing with the description of the perpetrator of aggression, intervention and colonialism or alien domination as a "leader or organizer", noted that other provisions aimed at any "individual who commits or orders the commission of" certain acts. He observed that, taking into account the extremely broad wording of article 3, paragraphs 2 and 3, concerning complicity and attempt, personal liability to prosecution under the draft appeared to be almost limitless - a result that ran counter to the intended purpose of the draft Code. The same

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representative suggested that in order to be both acceptable to as many States as possible and workable for a future international criminal court, the Code should concentrate on punishing the real leaders or organizers, an approach which however did not solve every problem inasmuch as the adoption of specific legislative measures - a punishable act under article 20 - was not necessarily the doing of one leader but might take the form of regular parliamentary acts and involve an entire parliament or administration.

156. Other comments on the scope of the Code ratione personae included the remark that the concept of "leaders or organizers" required a definition in the draft Code, and the observation that between the individual and the State there was still a whole range of possible perpetrators of crimes (Governments, political parties, organizations or groups) that should be treated differently. The example of the Nazi and Fascist parties after the Second World War was mentioned in this connection.

157. A number of representatives commented on methodological questions which arose in connection with part II of the draft.

158. Emphasis was placed in particular on the need to phrase the definitions of crimes in precise terms - a standard requirement in penal law. Although one representative was of the view that the subjective elements forming part of some definitions, such as the expression "good reason" in article 16, "large-scale destruction" in article 22, paragraph 2 (e), "as to create a state of terror in the minds" in article 24 and "on a large scale" in article 25, paragraph 1, probably had to be accepted, other representatives warned against imprecise definitions and insisted on the need to encompass legally definable crimes in order to ensure the widest possible acceptability and effectiveness and avoid any risk of dispute regarding the categories of crimes included in the draft. In this connection, one representative observed that some concepts, intended more for use by political organizations, ran the risk of failing to exhibit the precision and rigour normally demanded of legal concepts. Another representative noted that the basic requirement of any criminal legislation was that it should be clear, precise and devoid of political notions, since such notions were incapable of proper legal definition and therefore did not lend themselves to proper interpretation by a court, whether national or international. In his view, vague language and political notions had crept into several articles of the draft Code, such as articles 15, 17 and 18.

159. Attention was also drawn to the need to apply a consistent technique in defining the crimes covered by the Code. Thus, one delegation felt that the final version of the Code should offer a better balance between different articles so as not to create the impression that the list of crimes against the peace and security of mankind had been drawn up according to varying criteria. He noted that as currently drafted, some articles contained fairly detailed definitions, while for others, definitions were given only in the commentary, which would not be part of the Code itself. Another representative said that there was a need to provide for the relationship between the draft Code and existing multilateral conventions that addressed

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the crimes listed in the Code: in some cases the draft Code used the definitional language of those conventions, while in others it did not. A third representative, after noting that in some cases, such as genocide (article 19), the Commission had used the definition in the 1948 Convention, while in the case of the definition of aggression (article 15) it had referred to General Assembly resolution 3314 (XXIX) and tried to make the definition as limited as possible, pointed out that problems remained, such as the question of penalties for genocide as defined in the Code and genocide as defined in the relevant Convention and, in the case of aggression, the question of determining the influence of lack of action on the part of the Security Council.

Article 15. Aggression

160. Referring to paragraph 1 of the article, one delegation stressed that the "individual who as leader or organizer plans, commits or orders the commission of an act of aggression" should not be held solely responsible for the crime and that individuals occupying the highest decision-making positions who tolerated the commission of such acts should also be considered responsible, including, for example, leaders who did not prevent "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State ...".

161. In connection with the definition contained in paragraph 2 complemented by the following paragraphs, one representative noted that intention was not one of the constituent elements of aggression and that, consequently, excessive discretion was left to the courts in determining the responsibility of individuals. He pointed out that as the courts would be those of the country which had been the victim of aggression, justice would not be seen to have been done even if it actually had been. He added that there could also be conflicting interpretations of an alleged act of aggression if nationals of the country alleged to have committed aggression were tried in different courts, as was possible under the draft.

162. Referring to paragraph 3, one representative suggested that it should envisage the possibility of the application of collective sanctions in accordance with the Charter of the United Nations or other international or regional agreements, provided that the application of such agreements was limited to the jurisdictions of the States parties thereto.

163. Paragraph 4 was viewed by one representative as having no place in a legal document intended to define a crime, since it characterized as a crime "any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter". He pointed out that the provision in question, which empowered the Security Council to characterize an act as a crime once it had been committed, did not have the legal precision required in order to punish the perpetrator of the act. He moreover questioned whether such a provision respected the well-known principle in penal law expressed in the phrase *nullum crimen sine lege*.

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164. Paragraph 5 [9] was viewed by some delegations as acceptable. In the opinion of one of them, the determination by the Security Council was a legitimate pre-judicial procedural question. Another delegation felt that the paragraph should add that the decision of the Security Council did not prejudge the participation or guilt of the persons responsible under the Code. Still another delegation stressed that a solution should be found in paragraph 5 to reconcile the role of the Security Council in regard to States with the role of an international court in regard to individuals. The suggestion was also made that, depending on decisions to be taken in the future, it would be advisable that the paragraph refer to an international criminal court instead of or as well as to national courts.

165. On the other hand, one delegation found paragraph 5 superfluous, since, whether or not the Security Council intervened, the use of armed force in violation of the Charter was sufficient proof of an act of aggression.

Article 16. Threat of aggression

166. Several delegations supported the inclusion in the draft Code of the "threat of aggression" as a separate crime, in the view of some of them, however, subject to certain improvements in the current wording. Like article 15, article 16 gave rise to the observation that intention was not one of the constituent elements of the crime and to the remark that it was necessary to reconcile the role of the Security Council and that of an international court. The view was further expressed that the current wording was too concise and that the use of the word "seriously" in paragraph 2 was questionable since it was open to varying interpretations. Other suggestions for improvement included the remark that the title of the article encroached on the prerogatives of the Security Council and should be brought into conformity with the Charter of the United Nations, as well as the observation that incitement, including propaganda, should be mentioned in the text as it often preceded the commission of the crime concerned - an observation which was also made in relation to articles 19, 20 and 23.

167. Some other delegations expressed serious reservations on the article. One of them felt that the article left wide scope for subjective appraisal and established subjective criteria which were liable to be exploited for political purposes and were not adequate to condemn individuals as criminals. Another delegation expressed the view that article 16 dealt not with a mere threat of aggression but with the commission of an act of aggression, which was already covered by article 15, and with the ordering of an act of aggression which was covered by article 15 in conjunction with article 3, paragraph 3. In its opinion, therefore, paragraph 1 seemed superfluous, and paragraph 2 should be transferred to article 15.

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[9] Further discussion of issues raised by paragraph 5 may be found in paragraphs 251 to 255 below.

Article 17. Intervention

168. Support was expressed for this draft article, on the ground that small countries were the most vulnerable to intervention or attacks on the part of powerful countries. Reservations were however formulated on the reference to "intervention", which one representative described as unnecessary and incorrect inasmuch as intervention, which was a well-established concept in international law, had a much wider meaning than that contained in the article. One representative suggested to refer to "exceptionally serious" intervention.

169. As regards the definition of intervention in paragraph 2, one representative insisted on the need to distinguish between armed subversive or terrorist activities and all other activities of that type. He further observed that the concept of undermining the free exercise by States of their sovereign rights could not be dealt with in such a simple manner. In his view, fomenting subversive or terrorist activities was a very serious act in itself and an additional characterization could weaken the legal content of the article. One representative supported the deletion of the bracketed word "armed", while another favoured its retention on the ground that the text would otherwise cover an excessively wide range of acts and might cause problems in the future.

170. As for paragraph 3 of the draft article, one representative, after noting that it provided for an exception which could be invoked by those providing assistance to a people seeking to enforce their right to self-determination, said that instead of providing for exceptions it would be better to define exhaustively all crimes against the peace and security of mankind, including crimes against indigenous peoples. He added that the reasons for the crime should never be used to excuse its commission and should only be taken into account as attenuating circumstances in determining the punishment to be handed down.

Article 18. Colonial domination and other forms of alien domination

171. Some delegations welcomed the inclusion of this provision in the draft Code, one of them however suggesting that the words "exceptionally serious" qualify the forms of alien domination covered by the draft article.

Article 19. Genocide

172. One representative suggested that the Commission should in due course consider once again the relationship between genocide and the various types of crimes set forth in articles 20 to 22. In his view, some of the provisions concerned might perhaps be usefully combined in one article.

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173. A number of delegations expressed support for the inclusion of a provision on genocide in the draft Code. Such a provision was viewed an essential part of any code of international crimes. Comments focused on the relationship between the draft Code and the Convention on the Prevention and Punishment of the Crime of Genocide.

174. The Commission's reluctance to broaden the concept of genocide to cover other nominally similar, but in substance very different concepts met with approval. On the other hand, one representative held that the definition of genocide should be amended to cover all reasonable possibilities and suggested replacing the words "national, ethnic, racial or religious group" by "national, ethnic, racial, religious or other groups". Another representative noted that the Convention on the Prevention and Punishment of the Crime of Genocide stipulated that genocide and the other acts enumerated should not be considered as political crimes for the purpose of extradition and made it incumbent on the Contracting Parties to grant extradition in accordance with their laws and treaties in force. It was his view that this criterion should also be included in the draft Code.

Article 20. Apartheid

175. One delegation pointed out that this article, although it could be improved on second reading, offered an appropriate description of the evil practice of apartheid. Some delegations however expressed reservations on the use of that particular term. One of them, after noting that the provisions of the article were unfortunately not applicable only to southern Africa, felt that it would perhaps be better to substitute a generic term such as racial segregation or discrimination. Another delegation wondered whether, in view of the fact that apartheid as such was likely soon to become a thing of the past, the article might not refer to a less specific notion such as, for instance, "institutionalized racial discrimination".

Article 21. Systematic or mass violations of human rights

176. Several representatives supported the draft article. One of them viewed it as particularly important in that, while the crimes it covered were rare in countries in which the rule of law prevailed, there was every likelihood of their being committed in countries which did not have a democratic system. Another representative stressed that it was vital to establish a legal system which would make it possible to ensure greater respect for individual human rights and thus restore and maintain the peace and security of mankind. He added that he understood the article as referring to exceptionally serious offences committed in a systematic manner or on a mass scale and that isolated acts were covered by the various conventions on the subject. One representative suggested that the title be included in the first part of the text, so that it would read "... the following systematic or mass violations", for any isolated instance of the listed crimes might otherwise be covered by the Code.

177. Some delegations expressed satisfaction at the fact that the article incriminated the "deportation or forcible transfer of population". According to one of them, transfers of populations under article 21 meant transfers intended, for instance, to alter a territory's demographic composition for political, racial, religious or other reasons, or transfers made in an attempt to uproot a people from their ancestral lands.

178. One delegation pointed out that the denial of the right of indigenous peoples to their subsoil resources was a flagrant denial of their fundamental rights and should therefore be included in the list of violations of human rights that constituted the crimes dealt with in article 21.

Article 22. Exceptionally serious war crimes

179. Several delegations supported the current version of article 22. They found that the draft article was a good compromise between two divergent views among members of the Commission, one of which favoured the inclusion of an indicative or enumerative list of crimes, while the other favoured a general definition on the grounds that it would be difficult to reach agreement on the specific crimes to be enumerated and that the crimes to be listed could change as time went by.

180. Some delegations, while supporting the draft article in general, found that it would be advisable to consider further the relationship between article 22 and the 1949 Geneva Conventions and the Protocols Additional thereto. Thus, one representative pointed out that the war crimes covered by article 22 included new elements, such as injury to the environment, and differed from the grave breaches covered by the Geneva Conventions and Protocols thereto. Another representative suggested that a possible conflict of jurisdiction could arise for a State which was a party to both the Code and the 1949 Geneva Conventions and Protocols, in that the domestic courts of those States Parties could have jurisdiction over grave breaches which might also be amenable to the jurisdiction of an international criminal court as an exceptionally serious war crime under the terms of the Code.

181. Other delegations expressed reservations about the article. Thus one representative considered that war, on the one hand, and crimes against the peace and security of mankind, on the other, belonged to different categories. Other representatives drew attention to what were termed "ambiguities" concerning the relationship between article 22 and international treaty law. 10/

182. It is mostly the relationship between article 22 and the 1949 Conventions which gave rise to critical remarks. One representative questioned the need

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10/ Similar ambiguities were considered to exist in the case of articles 19 (on genocide) and 21 (as far as torture is concerned).

for such an article, since the crimes listed therein were, generally speaking, either grave breaches of the 1949 Geneva Conventions or well-established crimes under other instruments of international humanitarian law. Several representatives, referring to the phrase "exceptionally serious crimes", wondered whether an attempt should be made to prescribe a hierarchy of war crimes. One of them criticized the inappropriate introduction of political notions through the inclusion of a random listing of acts deemed to be "exceptionally serious". Another representative felt that the inclusion of only "exceptionally serious" war crimes in the Code would amount to an unnecessary limitation of its scope, particularly because such a qualification rested on two extremely vague criteria. The same representative suggested that a mechanism should be created for the prevention of war crimes whereby throughout all war operations an impartial international body should inspect the belligerents, inform them of the content of the laws of warfare and humanitarian international law and warn them of the consequences of war crimes for the population and for the responsibility of the perpetrators.

183. Also referring to the relationship between article 22 and international treaty law, some delegations noted, in connection with paragraph 2 (c), that a number of the conventions regulating the use of certain weapons had been ratified by only a limited number of States and that the question then arose whether a weapon prohibited under treaty law was illegal for nationals of a State which was not party to the Conventions in question. The remark was made that the Code did not indicate how such an issue could be handled. The question whether it was not premature to consider as a crime against the peace and security of mankind the violation of certain rules which were currently embodied in treaties and concerned questions still being studied by States was similarly raised in connection with paragraphs 2 (d), (e) and (f). One representative specifically reserved his position on subparagraph (d) in so far as it reproduced word for word a provision of Protocol I of 1977, and, inasmuch as it referred to collateral damage to the environment, did not seem to be in harmony with article 26, which referred only to wilful damage. 11/ He also questioned whether the Commission could validly formulate in the draft Code substantive rules on the conduct of military operations which, whether relating to the protection of the environment, of civilian property or of property of religious, historical or cultural value, required special studies in the light of their purpose.

184. Referring to the commentary to paragraph 2 (b), one representative noted with approval that in the view of the Commission, "establishing settlers in an occupied territory constitutes a particularly serious misuse of power, especially since such an act could involve the disguised intent to annex the

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11/ One representative noted that article 22 used the language used in Protocol I ("widespread, long-term and severe damage to the environment"), while the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques referred to environmental modification techniques having "widespread, long-lasting or severe effects".

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occupied territory" and that "changes to the demographic composition of an occupied territory seemed to be such a serious act that it could echo the seriousness of genocide".

Article 23. Recruitment, use, financing and training of mercenaries

185. Some representatives supported the inclusion of such a provision in the draft Code. One of them observed that the Commission had been right to confine the article to the agents or representatives of States and suggested limiting the text to "exceptionally serious acts".

186. The article however also gave rise to reservations. One representative expressed surprise at the fact that to some extent the text of the draft article differed from the wording of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. He furthermore noted that there seemed to be a contradiction between paragraph 1, which referred to an individual acting as "an agent or representative of a State", and paragraph 2, which referred in broad terms to "any individual".

Article 24. International terrorism

187. A number of delegations welcomed the inclusion of this provision in the draft Code. It was said in this connection that terrorist actions were unjustifiable and should be prevented and suppressed, that terrorists should be extradited immediately to the State whose interests or citizens were affected and that terrorism had no justification regardless of the motives of the perpetrators, even if they were seeking the liberation of a people.

188. A number of delegations, however, expressed misgivings about the fact that the scope _ratione materiae_ of the article was limited to agents or representatives of a State. They stressed that there were certain human values which must be respected not only by States but also by all those in the political arena and by all sides involved in an armed conflict, whatever its nature. In the view of those delegations, the article should also encompass acts of international terrorism covered by the existing network of multilateral anti-terrorism conventions, i.e., acts committed by persons not acting on behalf of a State.

189. Other comments included the remark that the qualification "systematic" should be included in the article in order to make it clear that the reference was not to ordinary offenders, and the observation that the phrase "acts against another State directed at persons or property" was imprecise, particularly in relation to hijacking of aircraft and maritime vessels.

Article 25. Illicit traffic in narcotic drugs

190. While the opinion was expressed that illicit trafficking did not qualify as a threat against the peace and security of mankind, the prevailing view was that article 25 had a place in the Code. Thus, one representative observed that drug abuse and illicit trafficking were accompanied by corruption, violence and terrorism, which were among the greatest scourges afflicting mankind. After pointing out that illicit cultivation and production of drugs now involved many more countries than previously, and that there were definite connections between criminals and ruling circles, he observed that the inclusion of drug trafficking in article 25 of the draft Code gave the issue due recognition as a crime against the peace and security of mankind. He regretted that despite the results achieved at the 1989 International Conference at Vienna, too few countries had imposed heavy penalties to eliminate that scourge. Another representative indicated that his country had concluded various bilateral agreements for the suppression of drug traffic and had advocated the adoption of laws aimed at preventing the production, processing and consumption of, and illicit traffic in, narcotic drugs.

191. The view was expressed that the Commission had acted wisely in confining itself to illicit drug trafficking, a concept precisely defined in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, from which the Commission had drawn inspiration.

192. Other comments included the remark that the phrase "on a large scale" created an uncertainty as to the scope of the article and the suggestion that reference should be made in paragraph 3 to the knowledge the person concerned had of the illicit nature of the psychotropic substance, for otherwise criminal responsibility might extend to persons innocently engaged in the manufacture, preparation or sale of such substances.

Article 26. Wilful and severe damage to the environment

193. Several delegations supported the article. Damage to the environment was viewed as one of the most fundamental problems currently confronting mankind and described as a constant threat to the general well-being of mankind. It was pointed out that recent history provided examples of environmental disasters on a massive scale and that the Code should therefore criminalize such acts as those involving a major nuclear disaster, for example, which were comparable in their effects to a war. Some of those delegations generally urged the Commission to take into account possible developments in this area, either in the United Nations or in other international forums, in particular the United Nations Conference on Environment and Development as well as forums dealing with the question of the exploitation of the environment as a weapon in times of armed conflict.

194. Doubts were on the other hand expressed as to whether a problem of such magnitude as wilful and severe damage to the environment could be dealt with in a brief text which left unanswered a number of questions such as the

context in which such damage was caused (international armed conflict or purely internal action) and the way in which a judgement as to the nature of the acts committed might be influenced by the means used or the aim pursued.

195. Comments on the wording of the article included: (1) the suggestion that the national heritage (lakes, rivers, falls, marshes, etc.) be separately mentioned in article 26 even if, strictly speaking, that concept was included in "environment"; (2) the remark that the inclusion in the article of the formula "widespread, long-term and severe damage", borrowed from article 55 of Protocol I to the Geneva Conventions, seemed to give a new dimension to the question of "long-term" damage; and (3) the observation that the conflict between the subjective requirement of wilfulness in article 26 and the apparently objective criterion of expectation in article 22 (d) could be resolved by deleting the word "wilfully" in article 26.

3. Penalties to be applied to crimes against the peace and security of mankind

(a) Question whether the draft Code should provide for penalties or make reference to the internal law of States

196. One representative held that the Code should not place too much emphasis on specifying penalties for each crime and should instead focus on incrimination and on the establishment of an international mechanism for cooperation in combating the crimes. He observed that in approving the Code each State would *ipso facto* recognize the crimes in its internal legal order and would be under an obligation to take appropriate steps to harmonize the two systems while at the same time duly observing fundamental human rights. Without belittling the principle *nulla poena sine lege*, he supported the view that penalties for crimes defined in the future Code should be determined by the competent court, taking account of the seriousness of the crime, that domestic legislation must take account of the fundamental human rights laid down in the International Covenants on Human Rights and that the Commission should seek a more rational form of inter-State cooperation in the area in question. He found it difficult to understand how penalties could be set out in the draft Code, thus apparently ignoring the jurisdiction and sovereignty of national courts. He expressed concern at what he termed an indirect attempt, under cover of the differences between national legal systems, to give special treatment to a criminal whose actions were by definition more serious than those of common criminals, and cautioned against limiting or superseding the sovereign jurisdiction of a given State's courts over the criminal acts in question, with respect not only to that State's own citizens but also to foreigners.

197. The prevailing view was however that the draft Code should provide for penalties for the crimes defined therein. In support of this approach, it was pointed out that the Code must be developed in strict conformity with the principles of criminal law, both in its preventive and in its punitive aspect, that once the international community had recognized the existence of

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international crimes it would be a retrogressive step detrimental to the effectiveness of the Code to deny the need for uniform penalties and that the crimes defined in the Code, which were extremely serious in nature, warranted commensurable punishment. The argument that it would be preferable not to seek to impose uniform sentences in a heterogeneous world was viewed as unconvincing at a time when the world was witnessing the emergence of a new subject of international relations, namely mankind.

198. Some delegations, while not opposing the idea of providing for penalties in the Code, struck a note of caution in this respect. Thus one representative, while recognizing that the draft Code should provide for penalties, as that would not only be in keeping with the principle nulla poena sine lege but would also help to avoid the substantial differences resulting from the diversity of national penal systems, observed that since different penalties might be prescribed for the same crime under the internal law of the various countries, any uniform regime of penalties that might be included in the draft Code might have difficulty in winning general acceptance. He added that, in considering the penalty provisions, the Commission would be well advised to bear in mind the extent to which States might be willing to compromise in that regard. Another representative, although welcoming the attention which the Commission had devoted to the possible inclusion of penalties in the draft Code, pointed out that this question raised difficulties for a number of countries owing to the diversity of legal systems and to the fact that, contrary to what happened in national law, there was in international law a wide range of different approaches and interpretations which made it difficult to adopt a homogeneous system of prevention. Still another representative, while accepting the desirability of having a degree of consistency in the penalties imposed for breaches of the Code, questioned whether this necessarily required that there should be mandatory sentences, particularly sentences that specified a minimum term of years of imprisonment, including life imprisonment allowing for no possibility of parole. He recalled that a cardinal principle of criminal law shared by many systems was that each convicted person should be treated individually, even though the punishment should also take into account the grave nature of the offence.

199. Some delegations observed that the answer to the question whether or not the Code should contain penalties for the crimes therein defined depended to a large extent on whether the implementation of the Code would be in the hands of an international court or in the hands of national tribunals.

200. Thus, one representative remarked that, if implementation were to be based upon the concept of "universal jurisdiction", it would be possible, instead of providing specific penalties for each of the crimes and thus facing the sometimes insurmountable difficulties involved in reconciling the contradictory concepts inherent in different legal systems, to follow the approach adopted by the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, the International Convention against the Taking of Hostages and the Convention against Torture, in which States undertook to make such offences punishable by severe penalties or by penalties similar to those imposed in the case of any ordinary offence of a serious

nature - an approach which respected the diversity of penalties existing in different systems of penal law and at the same time introduced an element of standardization of the action taken by national courts. In this representative's view, however, a different situation would arise, and a standard system of penalties would be necessary for the purpose of inclusion in the Code, if implementation of the Code or of part thereof were to be conferred on an international jurisdiction.

201. Along the same lines, another representative pointed out that if an international criminal court was created, a directive to such a court to apply penalties taken from the internal law of States parties would be difficult to follow in the absence of some clarification regarding the governing internal law, which could conceivably be the law of the victim State or that of the State in which the person was found or was being tried. In his view, penalties could be left to the internal law of the States parties to the Code only if trials were to be conducted by domestic courts applying the law of the forum, not by an international court or tribunal. He added that recourse to domestic courts in such circumstances would be unfortunate in a climate conducive to international cooperative efforts.

202. Yet another representative remarked that an international criminal court, if an agreement could be reached on its establishment, could help in establishing a degree of consistency in sentencing policy. He further observed that to the extent that penalties were imposed by national courts, many, though not necessarily all, practical matters would be resolved within the framework of national laws and that since the Commission was dealing with major international crimes it would not be right to leave all questions relating to the enforcement of penalties to be dealt with at the national level. He added that since the Commission envisaged the possibility of an international criminal court, the question of some international involvement in the practical enforcement of penalties assumed much greater importance.

(b) Question whether there should be a penalty for each crime or a single penalty for all crimes

203. Most of the delegations supporting the inclusion of penalties in the Code felt that a specific penalty should be provided for each crime. It was pointed out in this connection that, while all the crimes defined in the Code were of an extremely serious nature, each case should be considered on its own merits, as regards both the degree of gravity of the crime and the individual - a requirement which could hardly be met by a single form of punishment, even if it took account of extenuating circumstances. The proposition that a penalty should be specified for each crime was viewed as reasonable inasmuch as each crime had a specific and individual nature and should be punished according to the nature of the crime and the circumstances under which it had been committed. One representative stressed that, while the penalties provided in the Code should be set specifically for each crime according to its gravity and its specific nature, the maximum penalties prescribed should not prevent States that wished to do so from exceeding the required maximum, especially where there were aggravating circumstances. He

added that, at the same time, a presiding judge, pursuant to clearly defined provisions, could take into account any extenuating circumstances.

204. On the other hand, two representatives disagreed with the notion that a specific penalty should be provided for each crime defined in the Code. They expressed preference for the establishment of a single penalty, or set of penalties, applicable to all crimes under the Code - an approach which they viewed as consistent with the conceptual uniformity of the Code, in which all the crimes had the common characteristic of extreme gravity. One of them added that in addition to life imprisonment other penalties, such as the minimum and maximum term of years, could be specified, from which an international court would be able to select the penalty which was appropriate for the particular crime.

(c) Types of penalties to be envisaged

205. Many delegations pronounced themselves against providing for the death penalty in the Code. It was stated that there was a strong trend within the United Nations community towards the abolition of capital punishment, as evidenced by the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights aimed at abolishing the death penalty, as well as of Additional Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and that this trend which sought to limit as much as possible the application of capital punishment with the objective of completely eliminating it in the future should not be counteracted by the Code. One representative favoured the exclusion of the death penalty from the Code, not on moral grounds, but for the simple reason that it would give rise to too much controversy.

206. Some representatives however drew attention to some of the difficulties which the exclusion of the death penalty might entail. One of them pointed out that although his country had recently abolished the death penalty, it by no means underestimated the difficulties which its complete exclusion in the case of crimes against the peace and security of mankind might give rise to for countries whose legislation did provide for the death penalty, particularly if the system of universal jurisdiction were adopted. In his view, the question required more thorough consideration. Another representative, while recognizing that the tendency was to abolish the death penalty, felt that States where it was still in force were entitled to insist that it be included in the Code. To overcome that difficulty, he suggested to stipulate that the penalties applicable were those established by the legislation of the State of which the offender was a national.

207. As regards imprisonment, some delegations felt that if the death penalty were to be excluded, then, taking into account the gravity inherent in the crimes against peace and security of mankind, the only possible penalty would be life imprisonment. Some other delegations, while accepting, in principle, life imprisonment as the most severe form of punishment, did not share the view that it should necessarily apply to all the crimes defined under the Code. It was suggested that provision be made for the application of

extenuating circumstances, or for a commutation of penalties for humanitarian reasons, after a minimum period of 15 to 20 years, except for cases where aggravating circumstances existed. Mention was also made of the possibility of a partial remission or a reduction of sentence upon review by an international board. One delegation questioned whether life imprisonment was compatible with human dignity. As for terms of imprisonment, one delegation noted that despite their variety, all national legal systems made provision for deprivation of liberty. In his view, therefore, it was indisputable that crimes against the peace and security of mankind should be punishable by long-term imprisonment, subject to commutation where there were extenuating circumstances. Along the same lines, other delegations pointed out that the most natural solution seemed to be a term of imprisonment, with a minimum and maximum for each crime.

208. Among accessory and supplementary penalties, some delegations singled out confiscation, a concept which, it was noted, was in keeping with the legislation of many countries. It was said in this connection that the confiscation of property acquired illegally must be envisaged and regulated by the Code on the basis of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which provided for the confiscation of such property, including funds deposited in banks, and in the light of the work carried out by the Inter-American Juridical Committee on the establishment of a framework to determine not only the civil effects of the type of crime concerned, but also specific measures which could be laid down to supplement criminal penalties.

209. Regarding to whom the confiscated property should be allocated, one representative pointed out that the most obvious solution would be to restore such property to its rightful owners or to their heirs and that in the absence of owners or heirs the property could be placed in a trust or given to the State of the convict's nationality. Another representative shared the view that confiscated property should be returned to its rightful owner and disagreed with the suggestion reflected in paragraph 76 of the Commission's report that it be entrusted to humanitarian organizations. As far as drug-related money is concerned, the opinion was expressed that further studies were necessary.

210. One representative indicated that only bona fide property belonging to the accused could be lawfully confiscated. He moreover remarked that where the accused was serving a life or an extended sentence, the total or partial confiscation of his property might not be desirable, as his dependants would suffer, and it would be useful for the Commission to re-examine that point.

211. As regards community work, some delegations held that this penalty was not compatible with the heinous nature of the offences in the Code. One delegation, referring to paragraph 98 of the Commission's report, disagreed with the view therein reflected that it was difficult to draw a line between community service and forced labour.

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212. Some delegations indicated that the Code should also provide for the possibility of a civil action seeking reparation for damages caused by the perpetration of a crime, as well as restitution of stolen property.

213. One delegation also indicated that it would be worth considering the question of grounds for absolution which, in limited and specific cases, for example in cases of illicit drug trafficking, could encourage accomplices or partners to denounce the other offenders.

214. Some delegations made specific reference to the draft provision on penalties (draft article Z) which the Special Rapporteur had included in his ninth report and subsequently revised, and which is to be found, in its two versions, in paragraph 298 of the Commission's report.

215. Two representatives, while expressing preference for the revised version of article Z, formulated reservations thereon. One of them stressed, first, that the precise extent of life imprisonment should be clearly stated; secondly, that the Commission should carefully reconsider all the ramifications of the total or partial confiscation of property in order to evaluate its utility as a penalty; and thirdly, that the question of the deprivation of civil and political rights should be more thoroughly explored. In his opinion, some of the problems mentioned in connection with confiscation should also be re-examined in that context. The second representative wondered what was meant by the wording "deprivation of some or all civil and political rights". He pointed out that many of the rights set out in the International Covenant on Civil and Political Rights had passed into customary international law, and that the circumstances in which derogation from those rights was permitted were carefully specified. In his view, therefore, the Commission should tread cautiously in this area.

216. Also commenting on draft article Z, one representative said that the only penalty in the Code should be imprisonment for a minimum of 10 years and a maximum of 35 years, without commutation but with the possibility of reduction in the light of extenuating circumstances. While excluding life imprisonment, confiscation of property, forced labour and, in particular, the death penalty, he considered as acceptable the imposition of community work or the suspension of political or civil rights as part of the sentence. He added that his position was without prejudice to the domestic penalties which might be applicable in individual countries.

4. Establishment of an international criminal court

(a) General observations

217. The debate revealed three main trends as regards the establishment of an international criminal court.

218. According to one trend, the Commission should continue to take affirmative steps towards complying with the mandate contained in General

Assembly resolution 45/41 of 28 November 1990, by which it was invited, as it continued its work on the elaboration of the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism.

219. It was said, in support of the establishment of such a court, that a viable and lasting international order could not exist without the objectivity and impartiality of an international criminal court, an idea which appeared increasingly feasible in the changing context of international relations and in view of the spread of international organized crime and which, although it inspired reluctance among some States, jealous of their national sovereignty and of the jurisdiction of their national courts, could further advance international law and ensure uniform punishment of the most serious crimes. In connection with the changing context of international relations, the remark was made that this historic occasion now presenting itself should not be missed and that, although some delegations might fear that their juridical sovereignty would be undermined by the establishment of an international criminal court, especially if the latter were endowed with exclusive jurisdiction, the fact remained that international crimes were by their very nature so great and so offensive to the conscience of mankind that there must be recourse to an international body. It was also said that, since international criminals were no respecters of borders, the national security of States or domestic legal systems, the only viable and impartial alternative to domestic procedures and extradition was an international mechanism. The establishment of a permanent tribunal to deal with international crimes was viewed as conducive to the international rule of law and as a worthwhile goal for the United Nations Decade of International Law, and emphasis was placed on the valuable role it could play in reducing incidents of international and transnational criminality and on the contribution it could make to the codification of international criminal law. It was also pointed out that the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders had called for an examination of the possibility of establishing an international criminal court or a similar mechanism, and for the elaboration of provisions to ensure its effective functioning.

220. In support of an international court, it was also stated that the principle of a universal system of punishment of offences, embodied in various international conventions, was not an ideal solution in the case of international crimes, for two reasons: first, owing to the opposition which the principle had always provoked since it meant that national courts could pass judgement on the conduct of foreign Governments; and secondly, because it was logical that an offence against the international order should be tried by a court responsible for upholding that order. The argument that establishing such a court would be too costly an undertaking was viewed as unconvincing, and the remark was made that if the mere existence of the court could deter potential perpetrators from committing the crimes enumerated in the Code, then the material and other benefits of establishing it would outweigh any cost.

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221. A number of delegations favouring the establishment of an international criminal court believed that the Commission should undertake the drafting of a statute for such a court. One of them suggested that the proposed court should be a permanent institution composed of judges representing the chief legal systems of the world, and that it should be given the status of a United Nations organ through an amendment to the Charter. Some other delegations held the view that the statute should either be an integral part of the draft Code or be incorporated in a protocol annexed to the convention containing the Code.

222. Attention was also drawn to the possibility of establishing, side by side with the court, an international enforcement mechanism such as an international police force and to the alternative of ad hoc criminal courts, which it might be easier to set up.

223. According to a second trend, the idea of an international criminal body to try perpetrators of crimes against the peace and security of mankind, although worthy of attention, raised enormous difficulties and complex issues and therefore required extreme caution.

224. Thus one representative, while agreeing that in theory any legal order should have its own court, observed that the establishment of an international criminal court would entail practical difficulties. He pointed out that the decision whether or not to establish the court was basically a political decision that would depend on the evolution of the international community and its collective values and that the General Assembly's failure to pronounce itself on the question could be interpreted as indicating that it was an idea whose time had not yet come.

225. Another representative, after stressing that the question of the establishment of an international criminal court was enormously complex and raised profound legal, political and practical questions, recalled that the Commission had, in 1990, identified some 40-odd issues relevant to the matter and had begun to analyse them in 1991 further to the request contained in paragraph 3 of General Assembly resolution 45/41. He insisted that many questions (composition of the court, rules of procedure and evidence, investigations, incarceration, source of funding, etc.), which were linked to questions of principle, must be sufficiently addressed before States could decide whether the idea of an international criminal court was worth pursuing and that, furthermore, a fair degree of international consensus would be required in order to resolve the many problems mentioned above. In his view, therefore, the question of establishing an international criminal court required further study by the Commission.

226. Still another representative pointed out that the matter of the court could not be discussed in practical terms until draft proposals as to its composition, prosecutional system and finances, and the enforcement of its sentences were on the table. He furthermore remarked that States would have to confer jurisdiction on the court and that it would be necessary to determine the most workable relationship between such a court and national

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courts. While acknowledging that an international criminal court could provide impartiality and objectivity and give valuable support to the strengthening of international criminal law and cooperation between States, he warned that the sensitive issue of whether domestic courts or an international criminal court would have primacy of jurisdictional competence would need careful consideration.

227. Other questions which were mentioned as meriting further study on the part of the Commission included: (1) the question of how to avoid the risk of politicization of the court, particularly if it was called upon to operate on the basis of unsatisfactory definitions of the crimes; and (2) the question of whether the establishment of an international criminal court would mark any significant practical improvement in the existing situation. In this connection, one representative noted that for many international crimes there was already an elaborate though largely ineffective system of universal jurisdiction, which allowed those responsible for grave breaches to evade justice, most often because they were protected by their own authorities, which might well have ordered the commission of the offences. He wondered whether there were reasonable grounds for believing that the existence of an international court would improve matters and whether in view of the enormity of the task required by a subject that was at the outer edge of the task of promoting the progressive development of international law and its codification, the Commission should not perhaps wait until it had a specific request from the General Assembly before embarking on further work. In his view, the problems were as much of policy as of law and the new Commission should be given clearer policy guidance before it proceeded further, in particular, before it undertook the drafting of a statute.

228. According to the third trend, the idea of creating an international criminal court was not a workable one.

229. Thus, in the view of some delegations, it was important not to lose sight of the fundamental reality that the international community was composed of sovereign States which had always been sensitive to issues pertaining to sovereignty and that no State was willing to give up its jurisdiction over criminal issues. The remark was also made that effective systems of universal jurisdiction already existed for a large number of crimes and that an international criminal court should only be established if the certainty existed that it would definitely add to those systems. In this connection, one representative advocated a redoubling of international efforts to enhance international cooperation in suppressing crimes against the peace and security of mankind outside the context of an international criminal court. He emphasized the importance of bilateral and multilateral agreements to fight such crimes, including extradition treaties and bilateral and multilateral treaties on mutual assistance in the area of criminal investigation, prosecutions and other related proceedings.

230. Another representative pointed out that international machinery already existed to help settle conflicts between laws in civil matters through international arbitration, while protecting the jurisdiction of each court.

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He suggested that a similar system could be established for the crimes listed in the Code, subject to further study. While recognizing that prosecution in national courts called for considerable resources, particularly financial resources, and that the cost was often prohibitive for developing countries, he observed that the proposed international criminal court would also be costly, and the cost would logically be borne by States. He added that in the current serious international financial crisis States were far more interested in solving their economic and social development problems than in creating a new costly international structure and wondered if the existing structure of the International Court of Justice could not be made use of in that context, provided its Statute was altered and its mandate broadened.

(b) Nature or extent of the jurisdiction of the envisaged court

231. Some delegations expressed preference for a system whereby the international criminal court would have exclusive jurisdiction over the crimes under its competence, as this would eliminate the many complex problems that would lead to conflicts of jurisdiction between the court and national courts.

232. As an alternative, viewed as more likely to meet with the agreement of the majority in the international community, a system of concurrent jurisdiction with national courts was envisaged whereby States would be free to bring proceedings either before their own courts or before the international court, the international criminal court being endowed with jurisdiction only in cases where national courts declared that they were not competent. This system, while it was recognized as likely to ease the apprehension of some States regarding the maintenance of their sovereignty over criminal matters, was considered by some delegations as a potential source of conflicts of juridical practice and delays in the outcome of the proceedings.

233. As a variation of the concurrent jurisdiction approach, it was suggested to provide the court with jurisdiction to review decisions handed down by national courts. This formula was viewed as having the advantage of preserving the sovereignty of States while at the same time ensuring uniform punishment of international crimes and impartiality of prosecution. Reservations were however expressed regarding the possibility of endowing the court with a review competence over decisions of national courts. One representative, for instance, pointed out that it was extremely doubtful that States would be prepared to agree that decisions of their courts, including their Supreme Courts, could be subject to revision outside their own judicial systems. While acknowledging that the attribution of such competence to an international court was theoretically defensible, since national courts would have applied international law, he remained sceptical about the formula. Another representative, taking issue with some of the arguments in favour of the review competence of the court reflected in paragraph 116 of the Commission's report, stressed that the practice of human rights bodies on the international plane could not be invoked in favour of the formula in question. He observed that an international human rights body such as the Human Rights Committee was primarily concerned, in deciding whether a State

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was in breach of a human right, not with assessing the weight of evidence in a case that came before it from national courts but with determining whether there had been any gross unfairness. He pointed out that owing to that relatively limited role, an international human rights body was less likely to find disfavour with Governments than an international criminal court whose powers of review over cases from national courts were more than likely to cover all aspects of those cases, including issues relating to the weight or sufficiency of evidence.

234. Some delegations referred to the proposal reflected in paragraph 117 of the Commission's report whereby the nature of the crime should be taken into account in determining the extent of the court's jurisdiction, the court having exclusive jurisdiction over one category of crimes and concurrent jurisdiction over the other. Thus, one delegation suggested that the jurisdiction of the proposed court could be exclusive in the case of crimes against the peace and concurrent with national courts in that of crimes against the security of mankind. Other delegations questioned the feasibility of such a system, pointing to the difficulties of reaching a consensus on both categorizations.

(c) Jurisdiction ratione materiae

235. Most representatives were of the view that the envisaged international criminal court should have jurisdiction over all the crimes defined in the Code. It was said in this connection that the main criterion for inclusion of a crime in the Code was its gravity, which also qualified it to be subjected to the court's jurisdiction. In these representatives' views, subjecting to the court's jurisdiction only some of the crimes defined in the Code would depart from a global perspective and standardization of international criminal law, as would also limiting the court's jurisdiction to only some crimes defined in international conventions. One representative, in particular, stressed that if the court's jurisdiction were to be limited to only some of the crimes under the Code, there would be no judicial regime to deal with the persons responsible for acts declared crimes by and under the Code. In his view, there was nothing excessively ambitious in giving the court jurisdiction over all crimes under the Code and it was essential to avoid a situation in which crimes not subject to the jurisdiction of the court could be committed with impunity. Another representative furthermore held that if some international crimes were defined in other instruments but were not included in the Code, the jurisdiction of the court could be extended to cover them, provided that that extension was admitted in the instrument establishing the court.

236. Some delegations favoured a more restrictive approach to the jurisdiction ratione materiae of the proposed court. In their view, the court should have jurisdiction over those crimes where the determination of an individual's criminal responsibility was subject to an assessment which national courts could perform only with great difficulty, in other words, when domestic prosecution was impossible or insufficient. Among the crimes mentioned in this connection were aggression, threat of aggression, intervention, colonial

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domination and apartheid. One representative, in particular, pointed out that it was perhaps not necessary to envisage a system in which all the crimes identified in the draft Code had to be referred to an international criminal court and that there could be a mix of States exercising universal jurisdiction for some crimes, and an international criminal court to deal with such crimes as acts or threats of aggression. He remarked that limiting the jurisdiction of such a court to a narrow range of crimes might make it easier to deal with the complex problems involved. At the same time, he suggested that the Commission examine ways in which the system of universal jurisdiction might be made more effective.

237. Other comments included the remark that the court should have jurisdiction to cover the most serious crimes contained in the future code and covered by an international agreement, and the observation that the court's jurisdiction should not encompass acts which were serious and condemnable but did not really constitute crimes against the peace and security of mankind.

(d) Conferment of jurisdiction

238. Several delegations addressed the question whether conferment of jurisdiction on the court should depend on the consent of States.

239. A number of delegations supported in principle the Special Rapporteur's approach whereby the jurisdiction of the court must be based on the consent of the States parties to the court's statute which were directly concerned with the crimes being tried. It was remarked in this connection that, as in the case of the International Court of Justice, the fact that a State was party to the court's statute should not be enough for the court to have jurisdiction over crimes which might concern that State, and that a further step by that State (specific declaration or other) should be required to confer jurisdiction.

240. Other delegations were of a different view. One representative held the Special Rapporteur's proposal to be unnecessarily complicated. In his opinion, a State which accepted the statute of the court must be understood to have undertaken an obligation to adopt the necessary measures to give the court jurisdiction over crimes under the Code when the crime was alleged to have been committed in its territory, or when the perpetrator was one of its nationals, or when it was the victim State or the State whose nationals had been the victims of the crime. Another representative felt that the jurisdiction of the court should be established by the adoption of the court's statute and should *ipso facto* be binding upon all States parties to the statute. He remarked that the adoption of the draft provision on the conferment of jurisdiction proposed by the Special Rapporteur would entail the risk of making the court powerless to deal with the most flagrant crimes, those committed with the consent or upon the orders of a State by its own agents or representatives perpetrating their crimes under that State's territorial jurisdiction. The provision would, he further observed, run counter to the historic examples of the Nürnberg and Tokyo tribunals. Still another representative said that acceptance of the statute of an international

criminal court should mean acceptance of its competence, adding that the crimes envisaged in the Code were so serious that the competence of an international criminal court could not depend on the separate consent of the States parties. One representative noted with satisfaction that no member of the Commission had upheld the view that the permission of certain States was necessary for an international court to exercise its jurisdiction when such jurisdiction might in a given case have been established in accordance with an applicable international instrument.

241. The positions on this question were summarized as follows by one representative: according to one school of thought which sought to be realistic, the territorial criterion played a key role: the court would rule on crimes committed in the territory of a State party to the convention creating the court and the consent of that State - to be expressed on a case-by-case basis - would be necessary. According to the other school of thought, the crimes were considered as being directed not only against a State but against mankind as a whole and therefore of concern to the entire community of States. Consequently no State should be granted privileged status and the court should be able to intervene without the consent of the State in whose territory the crime had been committed or the State of which the perpetrator of the crime was a national. In this representative's view, it was difficult at the current stage to choose between the two approaches: the second seemed to be logical, but it had to be acknowledged that it did not really correspond to the realities of international life.

(e) Other aspects of the Special Rapporteur's proposals concerning jurisdiction

242. While support was expressed for the principle contained in paragraph 3 of the Special Rapporteur's proposed text to the effect that the court shall have cognizance of any challenge to its jurisdiction, the question was raised whether it was necessary to incorporate such a provision in the Code, since it reflected a well-established principle.

243. One representative supported the principle contained in paragraph 4 of the Special Rapporteur's proposed text according to which the court should be empowered to rule on any dispute concerning judicial competence that might arise between two or more States, provided that such jurisdiction had been conferred on it by the States concerned.

244. One representative endorsed paragraph 5 of the Special Rapporteur's proposed text under which the court may be seized by one or several States with the interpretation of a provision of international criminal law. She felt that this proposal could lead to the development and codification of international criminal law through the court's interpretation of many problematic principles and concepts, such as non bis in idem, and further remarked that the statute of the court would have to state whether its interpretation would be binding or optional. She suggested, as did also another representative, that the General Assembly, the Security Council and other United Nations organs be empowered to request an interpretation of a provision of international criminal law.

245. Another representative, however, felt that the paragraph in question was vague to interpret a provision of international criminal law. In his view, more problems would be raised than would be resolved by giving the court the power to interpret provisions of international criminal law other than those in the Code, and a consultative advisory jurisdiction for the court was unacceptable in view of the extreme gravity of the crimes under the Code.

246. Other comments on paragraph 5 included the remark that an interim international criminal court could be established, with the power to interpret customs, laws and international criminal conventions, so as to help to ensure the uniform application of laws and conventions, whether there was parallel jurisdiction or exclusive jurisdiction.

247. Also on the question of the court's jurisdiction, some delegations pointed out that consideration could be given to creating a review mechanism within the court itself in connection with the court's decisions. It was said that the idea of an international criminal court as a single instance with no appeal against its decisions would not be in conformity with recognized international standards of human rights. One representative, in particular, pointed out that the issue of appeal had not yet been seriously considered by the Commission but merited study since, from the point of view of criminal law, appeal was extremely important. He deemed it advisable to submit a criminal case to a chamber of the court, an appeal from the judgement of the chamber then being possible before the full court even though some might contend that an international criminal court was a supreme court whose judgement was not subject to appeal.

(f) Institution of criminal proceedings (submission of cases to the court)

248. A number of delegations indicated that the right to institute proceedings should be limited to States, specifically, the States parties to the court's statute. Some of them mentioned the additional criterion of the existence of a link between the State and the crime in question. One delegation stressed that international organizations should not have the right to become parties to the court's statute nor, therefore, the right to submit cases.

249. On the other hand, one delegation felt that individuals and not just States should be empowered to institute proceedings.

250. According to another view, the task of instituting proceedings and submitting cases to the court should be entrusted to an independent prosecutional body (procuracy, public ministry, parquet), namely, a public organ, as was the case in national judicial systems, and the role of the States parties to the court's statute should be limited to bringing the facts of a case to the attention of that public organ. Such an organ, one representative observed, could serve as a safeguard of the balance between the court's jurisdiction and the Security Council. The remark was however made that in order to ensure that the organ in question acted properly in the discharge of its functions the court might, for example, hear complaints against its decisions.

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251. In connection with the institution of criminal proceedings, some delegations addressed the question of the respective roles of an international criminal court and of the Security Council in the case of aggression or threat of aggression. After noting that the Commission had debated a provision which sought to make criminal proceedings subject to prior determination by the Security Council, one representative, while recognizing the logic of the arguments advanced against that idea, insisted that the procedure for instituting proceedings before the court should not be allowed to become a means of escaping the provisions of the Charter concerning the prerogatives of the Security Council to determine the existence or threat of an act of aggression. In his view, any solution which endangered the balance of competence in the sphere of international peace and security set forth in the Charter of the United Nations would be a disservice to the cause of international peace, and the establishment of an international criminal court would not strengthen the system of collective security based upon the Charter unless the court was integrated in that system and the existing checks and balances were preserved. Another representative, limiting the scope of his comments to aggression alone, noted that the question for the court would be to assign responsibility to an individual for having committed or ordered the commission of an "act of aggression". He pointed out that since "aggression" was defined in paragraph 2 of article 15 as "the use of armed force by a State", it seemed that an individual could not commit that crime if there was no act of a State. He recalled that, according to the Charter, it was for the Security Council to determine the existence of an act of aggression, and questioned whether it was possible for an international criminal court to convict an individual for an act of aggression unless the Security Council had determined that an act of aggression had been committed by a State. He concluded that the matter merited further reflection in order to arrive at a solution that took into account all its political and legal implications.

252. Some other representatives were in favour of a strict separation between the judicial functions of an international criminal court and the political functions of the Security Council. One of them pointed out that the two bodies, having different functions, would not operate at the same level. After recalling that in the past the Security Council had sometimes been paralysed by the exercise of the right of veto, he remarked that it would be incompatible with a proper concept of criminal justice to make incrimination dependent on the decision or non-decision of a political body. Another representative similarly remarked that in cases of aggression or threat of aggression the Security Council, its role being by and large a political one, might block certain criminal proceedings for purely political reasons.

253. Some other representatives insisted on the need to distinguish between various situations. One of them, after remarking that it was necessary to devise a system which took account of political realities and at the same time acknowledged the need to maintain the independence, prestige and respectability of the court, and after acknowledging that a solution that left the international court powerless to make a determination in respect of aggression contrary to one previously made by the Council would not be conducive to that end, felt it advisable to recognize that some issues were

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not justiciable and that, accordingly, the court should not investigate whether an act which had already been the subject of a determination by the Council constituted aggression. The court, he went on to say, would thus have no jurisdiction to try a case in respect of an act on which the Council had already expressed its views, but it would be left free to make its own determination as to aggression when no such determination had been made by the Council. Another representative, while agreeing that the rule on separation of powers would prevent the referral of cases to the court from being subject to a previous decision by a political organ such as the Security Council, observed that once a case had been referred to such an organ the court would have difficulty in ignoring its findings, especially if they bore on the substance of the acts constituting the aggression. However, he insisted that a refusal by the Council to deal with a complaint, for instance through the exercise of a veto, would have no effect on the normal course of the criminal proceedings, as the court would assess the merits of the criminal complaint entirely independently. He added that if the complaint led to a finding of guilt and a conviction, that decision might have political repercussions in the General Assembly or even in the Security Council. Still another representative suggested that the court be given the option of requesting advice from the Security Council which, however, would be solely in the nature of a recommendation, and that the Security Council could also seek advisory opinions from the court.

254. In this context, one representative referred to the experience of the Organization of American States, which had considered the question in relation to mutual assistance and had established that a regional body could also determine that a State was the aggressor when aggression was perpetrated at the regional level. He therefore remarked that the Security Council was not the only competent body on the subject and that regional bodies were also competent. In his view, the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization could consider the possibility of coordinating the search, within the United Nations and the Security Council, for a solution to that particular problem, in cooperation with the regional organizations.

255. Several delegations stressed that the Commission should further explore the respective roles of the Security Council and of an international criminal court with regard to the crimes of aggression and the threat of aggression.

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D. INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

1. General comments

(a) Background to the topic

256. A number of representatives emphasized the importance of the topic and the usefulness of elaborating a regime of international liability for injurious consequences arising out of acts not prohibited by international law. Attention was drawn to the principle of equity, which, together with the current state of international law, justified the adoption by the international community of the principle that States were responsible for activities carried out under their jurisdiction. It was also pointed out that many other bodies were grappling with the same issue in particular contexts and were looking for principled guidance, so that the Commission's completion of its work on the topic would contribute to the stability of the international legal system. Reference was finally made to the increasing disquiet generated by environmental concerns, especially in the wake of such tragic events as those that had occurred at the Chernobyl nuclear reactor, and to the growing awareness that, since the consequences of such disasters could not be borne by one State alone, there was clearly a need for States to cooperate in mitigating their effects.

257. Other representatives took a reserved attitude in relation to the exercise. Some wondered if the topic lent itself to codification and could validly be treated as a subject outside the application of the normal rules of State responsibility, particularly as the fundamental issue of its relationship to those rules had not yet been satisfactorily resolved in the Commission's work. It was also stressed that a regime of absolute State liability for injurious consequences arising out of acts not prohibited by international law, even of a residual nature, was a daring innovation which States might not be ready to accept as a general rule, even if it appeared in particular conventional legal instruments. Doubts were also voiced as to the desirability or even necessity of a common code on liability, and the view was expressed that a sector-by-sector approach leading to the adoption of separate legal instruments that took into account the various factual and legal situations was more realistic than a single regime, especially one concerning strict liability, which might apply to future as yet unknown circumstances and would thus amount to an open-ended obligation by States. In the opinion of one representative, for example, activities involving nuclear hazards were best dealt with in conventions dealing with that subject, just as liability for activities involving environmental pollution or, more specifically, the ozone layer should ideally be dealt with in the separate conventions devoted to those matters. It was also said that the codification of liability might lead to a reluctance to achieve further scientific and technical advancements.

258. The dual nature of the topic under consideration was widely recognized. Thus, one representative remarked that the substance of the topic seemed to

fall into two distinct parts: prevention of transboundary harm and compensation for such harm. Another representative observed that the objective of the exercise was both to prevent damage and provide reparation and to agree on a framework for guaranteeing that innocent victims were protected from transboundary harm and promptly compensated for damage caused.

259. Some representatives insisted on the need to keep the "prevention" and "reparation" aspects separate. Thus one representative pointed out that the problem of cooperation and prevention, to which the Commission attached special importance, and the problem of compensation for harm were two independent questions, and that the ensuing State obligations could not be linked to each other, as the topic would otherwise be indistinguishable from that of State responsibility.

260. The views expressed in relation to each of the two components of the topic are reflected in sections 3 and 4 below.

(b) State of the Commission's work on the topic

261. Some representatives felt that the Commission's in-depth analysis highlighted broad areas of consensus or trends of thought that could lead to future consensus. The opinion was expressed that the Commission had established a reasonable foundation for the draft articles and that the basic premises on which it seemed to have reached an understanding were by and large acceptable. One representative said that, although the Commission had been unable to submit even one part of the draft articles, it should not be concluded that its work had been ineffectual. After remarking that the topic was a particularly complex and difficult one which involved legal and political questions requiring careful consideration, he pointed out that the very fact that there had been a crystallization of views represented progress which would benefit the Commission's future work. One representative identified as follows the points on which, in his opinion, consensus was emerging: the draft should rest on the basic principle, inspired by principle 21 of the Stockholm Declaration that all human activities not prohibited by the State in its territory could be freely exercised within the limits imposed by liability for the harmful consequences thereof beyond the borders of the State, and that the victim should not be left to bear the loss alone; liability was based on harm, and not on risk; there was agreement on the principle of cooperation to prevent incidents and to contain and minimize transboundary harm; prevention procedures should be the subject of a separate non-binding instrument, and States should assume a unilateral prevention obligation to adopt the necessary laws and regulations and the appropriate political and judicial measures; compensation was due for any transboundary harm caused; there was agreement on the principle of non-discrimination set forth in article 10, and on the role to be played with regard to the topic by the concept of balance of interests; the term "activities" should be used in the title of the topic rather than the term "acts"; liability was based on transboundary harm produced by activities involving risk as well as by those with harmful effects; there should be a threshold for harm, although there was no agreement on its level or on the modifying adjective to be used (between

"appreciable" and "significant", however, the latter seemed to be preferred); harm had to be a physical rather than an economic consequence of the activity in question; the articles should regulate civil liability, and any liability incurred by the State should be residual in nature; and finally, high priority should be accorded the topic during the next quinquennium, with a view to concluding a simple, brief and principle-based instrument in an area where numerous conventions regulated specific dangerous or harmful activities.

262. Other representatives noted that the Commission had frankly acknowledged a lack of satisfactory progress on a topic which appeared to have so far been somewhat neglected. In their opinion, the Commission had made little headway in this area and was still considering the underlying questions and even questioning the value of the topic and its objective. One representative summed up as follows the main reasons why, in his opinion, relatively little progress had been made on a topic which had been on the agenda for many years and why no agreement had as yet been achieved on the general underlying principles: first, a good deal of preliminary effort had gone into defining the parameters of the topic; secondly, developments in the environmental sphere, which had been particularly rapid and sweeping in recent years, had had to be brought into focus; thirdly, the question of liability in any field depended on agreement being reached on the basic principles governing the control or limitation of air pollution and the establishment of air quality standards. Another representative, while acknowledging that the topic, by virtue of its complexity, was not one on which rapid progress could be expected, found it regrettable that the Drafting Committee had been unable to consider the articles submitted to it by the Commission since 1988. A third representative described the results achieved over the past 13 years as disappointing. He noted that although the principles underlying the topic were not new, some members of the Commission and of the Sixth Committee maintained that customary principles of international environmental law did not exist and that the very concept of liability for injurious consequences arising out of acts not prohibited by international law had no legal foundation, with the result that during the entire time that the topic had been under review not one article had been considered by the Drafting Committee or adopted by the Commission. He remarked that progress by the Commission on the topic was long overdue and that international environmental law, including that relating to the "global commons" and the United Nations Convention on the Law of the Sea, was evolving rapidly outside the Commission, as demonstrated by the adoption in June 1990 of the amendments to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, the adoption in May 1990 of the precautionary principle in the Bergen Ministerial Declaration on Sustainable Development in the ECE Region, the ongoing international negotiations on climate change and the progress achieved on other environmental issues, such as the protection of biological diversity, forest management and legal issues relating to the 1992 United Nations Conference on Environment and Development. After pointing out that the work of the Commission on the topic should by rights be the centre-piece of the evolving body of international environmental law, he concluded that unfortunately such was not the case.

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263. As regards future work in the area, a number of representatives felt that the Commission should make a sustained effort to achieve further progress without undue delay on a topic which some of them described as a priority one. One representative suggested that the General Assembly should invite the Commission to accelerate the work already undertaken in the area defined in article 1 of the draft (Scope of the articles) and that the Drafting Committee should rapidly consider all the articles that had been submitted to it. He pointed out that since the Commission had made significant progress on three other major items on its agenda, high priority should be accorded to the topic so that efforts would be successful by the end of the next quinquennium. Along the same lines, another representative felt that it should be the Commission's aim to conclude the topic within the next term of office of its members, ideally completing the first reading of the draft articles at its next session. More specifically, one representative, while mindful of the difficulty of drafting an instrument where consensus was lacking, particularly on the content and structure of the proposed instrument, observed that instead of reopening issues already examined, the Commission might wish to take a bolder step and proceed, as suggested in paragraph 196 of its report, to have the Drafting Committee examine the first 10 articles so as to obtain a more concrete consensus.

264. Other representatives struck a note of caution as regards future action on the topic. They felt that the time had come for the Sixth Committee to give careful and conclusive consideration to what exactly the International Law Commission should do with the topic and how it should proceed, and insisted on the duty of the Committee to provide the Commission with some guidance on which aspects should be given priority in the light of the current needs of the international community. One representative reiterated his country's strong reservations about the possibility of codifying the topic; he deemed it essential to first complete the draft articles on State responsibility, so that the two regimes of responsibility and liability could be related one to the other. Another representative, after observing that the Commission was experiencing considerable difficulty in achieving consensus, even though this was the basis on which it was expected to operate, described as frustrating the approach taken during the past 10 years and raised the question whether it was indeed realistic still to endeavour to formulate a general multilateral convention on the topic. A third representative stressed that the Commission, before giving consideration to specific draft articles, should establish a conceptual framework dealing not only with liability but also with the preconditions for the operation of liability regimes. He stressed that financial and resource transfers to financially weaker and developing countries were an important means of enabling such countries to orient their economies towards environmentally friendly methods of production, and highlighted the importance of programmes of international assistance, transfer of know-how and financial aid in emergency situations, as well as assistance designed to help States to deal with natural or environmental crises. He recommended that the Commission give careful analysis to the question of its future action on the topic, possibly by setting up a special working group to consider the issue.

(c) Legal basis of the topic

265. A number of representatives commented on the basic principles underlying the topic. One of them noted that there were at least two parameters which should be taken into account in this respect - (a) no one could avoid the consequences of his acts, and (b) there must be reparation for all damages caused - two parameters which were embodied in the form of general principles in some legal systems and should guide the work of the Commission. Along similar lines, several representatives noted with satisfaction that there was considerable support in the Commission for various principles, among which the principle of due diligence, the principle *sic utere tuo ut alienum non laedas* and the principle that the innocent victim should not be left to bear the burden of his loss were singled out.

266. The point was made, however, that the identification of the principles essential to any regime of liability was only a preliminary step and that the substance of the work would involve the formulation of a scheme for the interplay of those principles and of subsidiary rules to qualify and limit the scope of their application. It was also remarked that the Commission would need to adopt certain policy guidelines, especially to balance the interests of various groups and States.

267. It was broadly acknowledged that the topic was concerned more with the progressive development of international law than with its codification.

268. Some representatives took the view that the task of progressive development would prove extremely difficult in the area concerned because the basic concepts, particularly the concept of objective liability, were not as yet accepted in international law. In this connection, the remark was made that there was no absolute principle in customary international law providing for a State's liability for reparations or compensation for material transboundary harm arising out of physical activities carried out in its territory or under its control, and that objective liability always flowed from rare and exceptional provisions of special agreements. It was therefore suggested that the elaboration of principles relating to the subject should proceed within the context of the progressive development of international law, drawing inspiration from existing treaty law, which contained concepts already sanctioned by States.

269. Other representatives stressed that the work could be successfully completed if the Commission, within the context of its mandate related to the progressive development of international law, used a realistic but also innovative approach to meet the demands of an ever more interdependent international community, particularly in areas as sensitive as the protection of the environment. They remarked that the work was not proceeding in a legal vacuum. Attention was drawn in this connection to the two basic principles on the topic, contained in the 1972 Stockholm Declaration on the Human Environment: principle 21, which provided that States had the sovereign right to exploit their own resources pursuant to their own environmental policies, but also the responsibility to ensure that activities within their

jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction; and principle 22, which urged States to cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage. Those principles, it was recalled, had been recognized by several States as reflecting customary international law governing the conduct of States in dealing with environmental problems. Mention was also made of the three cases on which Stockholm principle 21 was based and which, together with that principle, should guide the Commission's work, namely: the Trail Smelter case, which had established that States had the obligation to avoid transboundary harm; the Corfu Channel case, which had established that no State could knowingly allow the use of its territory to the detriment of other States; and the Lake Lanoux case, which had established that States must take the interests of other States into consideration in their environmental planning.

(d) Relationship between the present topic and the topic of State responsibility

270. Some delegations observed that in its treatment of the topic the Commission was increasingly, in the words of one representative, led back to the classical concept of responsibility for failure to meet an obligation when injurious consequences resulted. Thus one representative noted the inherent contradiction in formulating general norms for eliminating risks due to dangerous activities and maintaining the thesis of liability *sine delicto*, when the violation of such norms, if they existed, could constitute a basis for classical international responsibility. Another representative similarly noted that the inclusion in the draft articles of provisions on prevention brought the relationship between State responsibility and State liability into play. He considered it self-evident that a State's failure to abide by an obligation to prevent transboundary harm entailed that State's international responsibility. As regards reparation, one representative noted that the possibility of securing compensation on the basis of classic international responsibility could not be excluded. She pointed out that a State, in authorizing or carrying out an activity, was implicitly authorizing the consequences of such activity and that if those consequences constituted transboundary harm the right of territorial sovereignty of the other State was infringed and that State was forced to bear damage in an area which was outside the jurisdiction or control of the State of origin of the activity. She observed that States had an obligation not to use or allow the use of their territory in a way that would infringe on the rights of other States, and that transboundary harm infringed on the territorial integrity and inviolability of other States, was in violation of the duty of non-interference laid down in customary international law and embodied in the precept "*sic utere tuo ut alienum non laedas*", and could also infringe upon the right to life, health and property and be detrimental to the environment and to permanent sovereignty over natural resources.

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271. The view was expressed, however, that those considerations did not exclude the possibility of an absolute liability regime in cases of transboundary harm, inasmuch as the affected party could opt to secure reparation in the liability regime most suited to him, as had occurred in the case of the Amoco Cadiz oil tanker.

272. Some representatives felt that the demarcation line between the two topics could be established on the basis of the criterion of fault. One representative remarked that the topic of State responsibility should be assumed to address the question of harm caused on the territory of one State as a result of fault (even though part one of the relevant draft articles on State responsibility was not explicit as to the relevance of fault), whereas the present topic would address the question of harm caused on the territory of a State in cases where there was no fault on the part of that State. Another representative, however, warned against overemphasizing the principle of fault, which placed the burden of proof on the victim, to the detriment of the principle of strict liability, or liability for activities involving risk, which placed the burden on the author of the harm. While stressing the importance of the theory of risk, in the light of modern technological advances and the attendant proliferation of risks, he urged the Commission to decide whether to follow the growing trend towards considering that harm could be imputed to a party only when there was fault on the latter's part, or whether it should follow the principle of liability for activities involving risk. He also urged the Special Rapporteur to attach due importance to the problem created for the developing countries by the clash between the concept of responsibility in the classical sense and the concept of liability in Anglo-Saxon law.

273. While some representatives expressed the hope that in the course of the future consideration of the topic the relationship and linkage between the two topics would be clarified not only conceptually but also from the point of view of practical application to specific situations, the suggestion was also made that the issue of any overlap between the two topics should be debated outside the Commission, so that the Commission could proceed with the increasingly urgent practical task of developing international environmental law.

2. Scope of the topic

(a) Basic orientation of the topic

274. While the constant deterioration of the environment and the risk of accidents resulting in disastrous or catastrophic transboundary harm were viewed by various representatives as providing the main justification for the elaboration of a regime of liability for the injurious consequences of acts not prohibited by international law, several representatives warned against overemphasizing those concerns in the context of the present topic. Such an approach was perceived by some representatives as unduly restricting the Commission's mandate which, according to them, encompassed all activities of

individuals and organizations that caused or might cause transboundary harm, whether environmental or not. It was at the same time viewed by other representatives as broadening the scope of the topic as originally envisaged. Thus, one representative recalled that the topic was initially geared towards activities causing harm, and activities involving the risk of causing harm, in a neighbouring country and that the Commission had strayed from that area as a result of excessive concentration on environmental and ecological matters, including the questions of dangerous substances and of environmental accidents and ecological disasters, which did not fit appropriately into the topic. Another representative objected to giving too much emphasis in a multilateral instrument to the protection of the natural environment, because that would only call into question the positive results of several years of in-depth consideration and would unduly delay the conclusion of the Commission's work. He further observed that such an approach would conflict with the interest of developing countries, which had neither the financial resources nor the necessary technical know-how to prevent or minimize the adverse consequences of activities carried out under their own jurisdiction or control and therefore had a greater need than the industrialized countries for clear and strict norms of responsibility determining, at the bilateral level and taking into account the specific situation of each country, the respective role of the State of origin and the victim State in respect of prevention and reparation.

(b) Elements to be taken into consideration in defining the scope of the topic

(i) The criterion of lawfulness

275. According to one trend, the future instrument was intended to cover only lawful activities, inasmuch as activities prohibited by international law were covered under State responsibility, as were the consequences of such activities.

276. According to another trend, the topic fell naturally within the ambit of State responsibility. Thus, one representative held that if no breach of a State's legal obligations in terms of unilateral measures of prevention occurred, liability should rest with the operator, with the State being only responsible for the failure to act with due diligence.

277. Under a third approach, harm caused without any obligation having been breached by the State concerned might simply be considered the result of forces beyond the control of the State and in such a case the State in which the event had taken place and the State incurring transboundary harm were both victims and must cooperate in remedying the situation.

(ii) The criterion of harm

278. The concept of harm was generally recognized as central to the topic. Comments in this connection included the remark that only physical harm should be taken into consideration and the observation that the threshold for liability should be raised from "appreciable" to "significant" or "serious"

harm. The view was also expressed that only transboundary harm resulting from a hazardous activity should give rise to liability. This view was, however, objected to on the ground that determining liability on the basis of the hazardous nature of the activity would drastically reduce the scope of the draft articles inasmuch as damage, even if substantial, could be excluded if it was the result of non-hazardous activities. It was remarked that activities of the latter type might have catastrophic consequences while hazardous activities might never cause damage and that, in elaborating the draft articles, the Commission must bear in mind that the main objective was to provide for compensation for damage incurred and a regime of reparation, independent of the hazardous nature of the activity.

(iii) The criterion of risk

279. The question whether the topic should encompass activities involving risk of causing harm in addition to those actually causing transboundary harm was addressed by several representatives.

280. Some felt it inappropriate to include within the scope of the topic a wide range of activities which could result in transboundary harm but which could well require different liability regimes. The remark was made in this connection that the law in many of those areas was still at a very early stage of development and that if the Commission attempted to address all activities that involved risk the topic would become much too broad and unwieldy. One representative, in particular, remarked that to extend the scope of application of the draft articles to activities involving risk of harm would render the task of the Commission extremely complex, since all human activities were accompanied by some element of risk and would inevitably lead the Commission to arrive at more substantive preventive measures which might well go beyond the mandate initially entrusted to it. He observed that, as international law stood, each State was already required to take all necessary precautions to prevent the harmful consequences which might result from high-risk activities. To ensure a measure of uniformity in this particular area, he suggested proceeding at the regional level, an approach which offered the advantage of taking into account the specific features of the States concerned. Another representative wondered if elaborating a legal regime encompassing high-risk activities and harmful activities was not too ambitious a goal. He observed that a single regime, especially one concerning strict liability, which might apply to future as yet unknown circumstances, would amount to an open-ended obligation by States and therefore deemed it preferable to take a different approach, distinguishing between the two types of activities.

281. The prevailing view was, however, that the Commission's work should cover both activities involving risk and activities with harmful effects. Support was voiced in this context for the Special Rapporteur's definition of both categories of activities, as well as the method of treating them together under a single regime while taking into account the special features of each. The Commission was praised for having given the concepts of harm and risk their fundamental place in the topic with actual harm entailing liability, and

prospective harm, or risk, creating obligations of prevention. In response to the argument that the concept of risk might unduly broaden the scope of the topic, the remark was made that the fact that it was necessary to determine the nature of risk in the context of the topic, particularly in the articles concerning prevention where the problem of threshold arose, was not an obstacle to establishing a single regime, because the problem arose in respect of both risk and harm.

282. The representatives in question none the less agreed that a certain reasonable separation was inevitable, given the fact that actual harm caused would have to be viewed more seriously than potential harm and that it might perhaps be necessary to develop some separate rules for each of those two categories.

283. Several representatives commented on the concept of "activity involving risk". One of them pointed out that it was very difficult to determine whether there was a higher than normal probability of causing transboundary harm and that it might therefore be more useful to refer to any activity that could cause such harm. She observed in this connection that in some circumstances activities such as routine agricultural operations could be more harmful than those classified as activities "involving risk".

284. Other comments on the concept of "activity involving risk" focused on the question whether in identifying dangerous activities or substances it was preferable to rely on general objective criteria or to establish a list.

285. Some representatives felt that a general definition was better suited to the evolving and complex nature of the subject. A list was viewed as having no place in a general instrument, as a potential source of problems and as bound to be incomplete since the Commission did not have the necessary technical information to prepare it. More specifically, one representative observed that the emphasis placed on the concept of damage in draft article 1 should, to the greatest possible measure, be reflected in draft article 2, the scope of which might be narrowed considerably by the inclusion of lists of dangerous substances or activities. In his view, the inclusion of such lists, in combination with the use of the concept of risk as a criterion for determining liability, might have the unfortunate effect of shifting the Commission's focus from elaborating a convention on international liability for injurious consequences to elaborating a convention which would simply limit liability.

286. Other representatives, while recognizing that a list could not serve as a replacement for a general definition indicating what kind of activities or dangerous substances would be covered by the topic, did not exclude the possibility of including a non-exhaustive list of dangerous substances and activities. It was suggested that such a list be annexed following the model of conventions on the prevention of marine pollution and that it take the form of guidelines.

(c) Question of the "global commons"

287. The question of the "global commons" was generally recognized as an important one. Emphasis was placed on its universal scope, and concern was expressed about the constant deterioration of the global environment. Views were however divided as to whether the question should be addressed in the context of the current topic.

288. Some representatives answered in the affirmative. One of them said that, despite the absence of an international body responsible for the global environment, the principle affirmed in customary and treaty law, in the 1972 Stockholm Declaration and in various General Assembly resolutions that States were obliged to ensure that activities carried on within their jurisdiction or under their control did not cause harm in regions outside their jurisdiction was sufficiently well established for it to be worthwhile to invite the Commission to consider the issue and make proposals, in the interests of developing international law in respect of liability and compensation for harm caused to the global commons. Another representative observed that the main principles of cooperation, prevention, and so on, should be appropriately applied to any harm caused beyond the limits of national jurisdiction, whether to another State or to mankind as a whole. He added that the fact that the problems of liability were even more complicated in the case of harm to the global commons than in respect of harm caused to States and their citizens should not play a decisive role with regard to the extension of the scope of the instrument.

289. Other representatives were of the view that the question of the global commons was quite distinct from the original topic and went beyond its scope. One of them observed that the most serious threats to the global environment were caused not by ultra-hazardous activities but by everyday industrial and other activities which resulted in "creeping pollution" and that such activities and their transboundary effects did not lend themselves to the clear-cut application of a regime of the kind under consideration. He pointed out that the distinction was between activities causing transboundary harm in a situation where the State of origin and the victims were clearly identifiable and activities where there was no causal link between an operator and a victim. Another representative observed that in some cases it was difficult to determine the origin of damage and reparation for it, and that there were also serious difficulties in establishing mechanisms to make such determinations and defining their jurisdiction and competence. In his view, damage to the global commons was not sufficiently clear to permit the establishment of the relevant legal norms and principles. A third representative, after similarly drawing attention to the vagueness of the concept and to the difficulty of determining the State or States of origin or the State or States affected and of assessing the harm in question, held the view that if the international community were to give that unexplored field the thought it deserved and deal with it on the basis of professional scientific knowledge, it would first have to decide on an appropriate mechanism for international cooperation. In his opinion, it would be premature to establish any legal principles of international liability in this field.

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290. Another argument adduced in support of the view that the time had not yet come to try to establish general principles of international law on the subject related to the absence of sufficient background information. One representative observed, in this connection, that the Commission would need more scientific studies to examine all aspects of harm caused to the global commons by human activities and that, as such studies were not yet available, it might be inadvisable to formulate detailed rules on matters that were still in embryonic states of investigation and research.

291. Also against the inclusion of harm to the global commons within the scope of the present topic, it was stated: (1) that the issue was connected to international norms agreed upon in a multilateral context and was already under consideration in other international bodies concerned with formulating instruments on various aspects of the environment; (2) that the Commission was not the appropriate body to deal with the issue because it was likely to be overtaken by other more specialized bodies; (3) that the codification of a general regime of international responsibility for the global commons would be difficult and time-consuming and would delay or even jeopardize the successful conclusion of the work on the original topic; (4) and that there was a risk that States would be reluctant to accede to the resulting instrument.

292. As regards future action on the question of the global commons, some representatives felt that the issue should be left to separate legal instruments embodying the recommendations of the Stockholm Declaration and of other international texts, among which one representative singled out the Basel Convention and the Montreal Protocol. Others felt that a decision on the matter should be deferred. Still others suggested that the question be included in the long-term programme of the Commission.

3. Prevention

293. The importance of the "prevention" component of the topic was generally recognized. The remark was made in this context that the counterpart to the sovereign right of the State to carry out lawful activities within its territory was its obligation to ensure that the activities in question did not cause transboundary harm. One representative said that there was a clear need to include provisions on the prevention of transboundary harm, for preventive measures must first come into play when countering such harm; he remarked that in fact the thrust of international cooperation was currently on preventive measures and therefore noted with satisfaction that the principle was manifested clearly in the draft articles. Another representative insisted that the development of preventive regimes was the most valuable aspect of the Commission's work, for where damage to the environment or human health was concerned, prevention was always better than cure. A third representative pointed out that the notion of appropriate preventive measures was important and should be included, not only because it supplied reasonable checks and might reduce the scale of transboundary harm, but also because it gave legal substance to the concept of risk. He remarked that if that concept were admitted as being relevant to the topic, a regime lacking in preventive measures would be inherently weak.

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294. Some representatives, on the other hand, mentioned various factors which in their view were essential to a balanced approach of prevention in the context of the topic. One such factor was the need to keep in mind the basic idea underlying the topic, namely that the innocent victims should not be left to bear the loss alone even if the party that had caused the damage was not guilty in the legal sense of the word. In this connection, one representative indicated that he could go along with the clear tendency in the Commission's work to stress the need to prevent and avoid damage but only to the extent that this trend did not obscure the original meaning of the topic. He further observed that even if it were possible to determine precisely which activities involved risk with a view to regulating them it would not be possible to include all possible cases of transboundary harm that did not entail culpability. He added that any activity was potentially dangerous and that where there was life there was risk.

295. A second factor was the need, duly acknowledged by the Commission, to strike a balance between, on the one hand, allowing States their legitimate freedom of action on their territory and, on the other hand, ensuring that States would exercise due care to prevent harmful transboundary results from such activities. The remark was made that the object should not be to prohibit otherwise lawful activities, but to regulate the manner of their operation so as to prevent or minimize the risk of transboundary harm and to require that information and consultation be offered to the affected State in good time.

296. Other factors which were mentioned in this context related on the one hand to the situation of developing countries which, because of their lack of technical and financial resources, could not adequately regulate activities involving risk and, on the other hand, to the concept of balance of interests. In the latter connection, one representative expressed agreement with the approach in draft article 17, which listed the factors that should be taken into account by States in conducting negotiations aimed at achieving an equitable balance of interests in relation to an activity causing, or creating a risk of causing, transboundary harm.

297. As regards the type of activities to which the concept of prevention should apply, comments focused on three aspects, namely: (1) whether prevention related mainly to risk activities or was also relevant to the containment of harmful activities; (2) the lawful or unlawful character of the activities; and (3) their potential harmfulness.

298. On point (1), the remark was made that since the principle of prevention formulated by the Commission involved the mitigation of harm actually incurred in the territory of a State it was clear that, as formulated by the Commission, the proposition was much broader than the conventional idea of "prevention", for the Commission had thought fit to include under that principle what was actually a duty resulting from the consequences of harm caused. Support was expressed for the idea that preventive measures should be applied not only for activities involving risk but also for those which actually caused transboundary harm, it being understood that, in the first

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case, the object would be to avoid the occurrence of harm while in the second it would be to avoid an increase in transboundary harm or reduce the frequency of its occurrence. It was also stated that consideration should be given to activities which involved a risk of transboundary harm and also to those which actually caused such harm and that if a State engaged in the former type of activities, it must pursue a resolute policy of diminishing the element of risk and must exercise due control of the activity.

299. On point (2), one representative said that the inclusion of provisions designed to set limits to the freedom of action of States to carry out or to permit activities in their territory or under their jurisdiction or control, or to prevent activities involving risk or activities with harmful effects, could only be properly judged when it was clear whether the topic was to deal only with activities which were lawful under general international law or with activities which were not unlawful *per se* but might be unlawful under certain conditions. He observed that in the former case the provisions concerning prevention should be phrased in recommendatory terms and could only be made obligatory by way of progressive development of the law through their inclusion in an international agreement, whereas in the latter case the provisions would have to be obligatory. After pointing out that the principle in draft article 6 concerning freedom of action and limits thereto was only in part inspired by principle 21 of the Stockholm Declaration and was mainly based on the maxim "*sic utere tuo ut alienum non laedas*", which stated the obvious and was thus somewhat useless, he stressed that the real question was what the right of the other States implied in cases of transboundary harm caused by activities which were not unlawful *per se*. In his opinion, the provisions on prevention in the sixth report of the Special Rapporteur (A/CN.4/428), which were couched in obligatory terms, would be difficult to understand if the topic was to deal with activities which were definitely lawful under international law as well as those which were not unlawful *per se*.

300. As regards point (3), one representative observed that not every activity which might cause harm should necessarily be subject to the draft articles. He emphasized the need to define thresholds and to require that the risk be of a certain magnitude and the possible harm of a certain degree of gravity. While agreeing that it would not be easy to define the notion, he insisted that an initial assessment be made in order to determine whether an activity fell within the scope of the articles and that the Commission decide whether any role in that assessment belonged to States which might be affected by the harm. Also referring to the question of the threshold over and above which the affected State could demand prohibition of an activity, another representative suggested that the Commission should consider merely referring to harm which was unreasonable in scale or intensity, or even dispense with any reference to a quantitative or qualitative test.

301. As regards the obligations involved, the general remark was made that the Commission could either aim for precisely defined legal obligations in relation to specific hazardous substances and activities, or it could promote the development of broader preventive regimes by providing a framework for further instruments or ad hoc negotiations. The view was expressed that the

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Commission should be clear as to which it wanted before the material went to the Drafting Committee.

302. More specific comments on the obligations of States in the area of prevention centred on substantive obligations, on procedural obligations and on the eventuality of non-compliance with the obligations in question.

303. On the first point, several representatives favoured firm, substantive obligations. Some remarked that only unilateral preventive measures designed to minimize risk should be imposed, because they derived from the fundamental obligation of due diligence including, in accordance with general international law, the obligation to make reparation for cases of possible negligence. Mention was made in this context of the obligation of States to adopt all necessary measures to ensure that activities within their territory did not cause harm beyond their frontiers and of their obligation to adopt preventive measures before transboundary harm occurred, as well as unilateral measures, whether legislative, regulatory or administrative, to restrict harm caused beyond their frontiers by an operator in their territory. The view was expressed, on the other hand, that the obligation of due diligence seemed well established in general international law and did not need to be reaffirmed in detail in the draft articles. It was also said that, while the proposed instrument might lay down the general duty of prevention of transboundary harm, it was doubtful whether the instrument should specify in detail the preventive measures to be taken by States and that such matters would be better included in model rules to be annexed to a binding instrument.

304. On the second point relating to procedural obligations, emphasis was placed by one representative on the role of consultations and on the desirability of urging all States concerned to consult with each other in a spirit of cooperation, and support was expressed for the idea of including procedural norms for applying preventive measures. The formulations proposed by the Special Rapporteur, however, gave rise to reservations. While some representatives felt that they should be further simplified and presented only as recommendations or in an optional protocol so as not to impede the freedom of States to act without foreign interference, other representatives called for more precision. One of them noted that certain principles of procedure (e.g., notification, consultation, negotiation and settlement of disputes concerning an environmentally "dangerous" activity) should be defined more clearly with regard to both their contents and the scope of their application. He remarked that in their current form those principles were of little use and raised contentious issues which might enter into conflict with other important principles of international law, such as sovereign equality of States, sovereignty of States over their people and territory and sovereignty over natural resources. In his view, many of the procedural principles in question, instead of being conducive to cooperation, might well lead to disputes between States, especially in the absence of an agreed understanding between them on measures to be employed, safety standards to be monitored and steps to be taken in the case of inherently or potentially dangerous activities. Another representative suggested that the draft should go into more detail on specific situations. On the question whether an activity that

normally caused transboundary harm or could cause such harm should be suspended, she noted that two situations should be envisaged: when the activity had not yet been started or was being planned, and when the activity was being carried out. She remarked that in the first case it would be useful not to begin the activity until the end of a fixed period during which negotiations should be conducted with States which might be affected so as to reach agreement, and that failure to reach agreement within the time-limit could amount to a veto, whereas in the second case it could be agreed that the activity would continue during a fixed period with the obligation of reaching a negotiated agreement. She observed in this connection that without such a time-limit failure to reach agreement would be a means for one State to force another State to bear harm it did not wish to accept. The same representative deemed it useful to deal in the draft with the problem of the construction of major works and with harmful effects of natural phenomena; in connection with the latter problem, she suggested that specific norms be established for prevention and that obligations be laid down for the State in which the damage had originated, individually and in cooperation with affected States, to adopt measures to reduce the harmful effects.

305. As for the third of the above-mentioned points, namely the eventuality of non-compliance by the State of origin with preventive measures, the remark was made that the ensuing consequences remained unclear. One representative indicated that he saw no reason why such non-compliance should not give rise to legal responsibility in the normal way. Another representative stressed that a breach of obligations to prevent possible harm would entail a liability which went beyond the limits of strict liability. Several representatives insisted on the importance of a compulsory peaceful settlement mechanism to be set in motion failing agreement through the other methods for the settlement of disputes set out in Article 33 of the Charter of the United Nations.

4. Reparation

306. Emphasis was placed by several representatives on the fundamental importance of the reparation component of the topic. It was recalled that the main reason for the inclusion of the topic in the Commission's agenda was the concern to compensate the victims of harm caused by activities carried out in places under the jurisdiction of a State other than that in which the victim resided. Reparation for actual damage was accordingly held to be a priority aspect of the topic - a conclusion which logically stemmed from the two guiding principles of the Commission's work in this area, the precept "*sic utere tuo ut alienum non laedas*" and the principle that the innocent victim should not be left to bear the loss alone.

307. As regards the question of determining what harm should be compensated, comments focused on the origin of the harm, its extent and the extent of the duty of compensation.

308. On the first point, some representatives held that harm should be compensated whether or not the cause was a dangerous activity, while others

rejected the idea that any kind of transboundary harm, whether or not resulting from a hazardous activity, should give rise to liability.

309. On the second point, some representatives held the view that only appreciable or major harm should give rise to compensation.

310. As for the third point, emphasis was placed on the need to enable States to assess the extent of their duty of compensation and, to that end, to provide a clearer definition of harm than the one contained in article 2 (g). It was suggested that, as a minimum, compensation should be made for the cost of measures taken by the affected State to mitigate the harm or restore the environment to its former state. Reference was made in this context to the list of the kind of losses encompassed by the concept of damage, which had been drawn up by the Ad Hoc Working Group of Legal and Technical Experts convened by the United Nations Environment Programme to work on a protocol on liability and compensation for damage resulting from the transboundary movement and disposal of hazardous wastes.

311. It was generally agreed that transboundary harm should, in principle, be fully compensated. Some representatives, however, insisted on the need to regulate the amount of reparation on the basis of the criterion of balance of interests, one of them suggesting that principles be elaborated to that effect. One representative favoured the idea of reducing the amount of compensation payable by the State of origin if the nature of the activity and the circumstances indicated that it would be equitable to divide the cost between that State and the State suffering the transboundary harm. He added that the question of compensation should be settled by agreement and endorsed the idea expressed in article 23 that compensation should be reduced if the State of origin had taken precautionary measures solely for the purpose of preventing transboundary harm. In this context some representatives referred to the situation of developing countries which could not adequately regulate activities causing harm on account of their lack of technical and financial resources. One of them remarked that because of their state of economic underdevelopment and financial dependence on the industrialized States and international financial institutions, third world countries should benefit from specific criteria that would establish a more equitable balance of interests.

312. On the other hand, the view was expressed that it was difficult to understand on what legal grounds the State of origin would be entitled to ask for a reduction in the payment. The remark was made that the payment of full compensation was surely the price to be paid by the State of origin for being able to continue with an activity involving or having harmful effects.

313. A number of representatives commented on the question of the assignment of liability.

314. Some representatives felt that the primary liability should rest on the State as a function of its sovereignty. One of them emphasized that the State from which transboundary harm originated was the international actor towards

which another injured State and its citizens ought to be able ultimately to look for a remedy, even though it had the option of meeting its liability by establishing suitable mechanisms of recourse so as not to have to pay itself for any harm. While acknowledging that under a number of conventions governing specific activities compensation was the responsibility of the operator with residual liability being assigned to the State, he remarked that this approach did not reflect the basic legal position and that, while States were free to enter into agreements of the type referred to above, that did not alter the basic proposition that a State was liable to provide full compensation for damage caused to other States or their citizens by activities within its jurisdiction or control. He added that if the liability of a State to provide compensation arose from its obligation not to allow activities within its jurisdiction or control to harm other States, then the distinction between "private" and "State" activities had limited validity. Along the same lines, another representative questioned whether there was good reason to depart from the established rule, which placed strict liability on the State in whose territory the offending activities were conducted. He insisted that the basic principle confirmed in the Trail Smelter arbitration be adhered to and that due account be taken of the fact that the State exercised absolute authority over all lawful private and public sector activities in its territory. A third representative remarked that the State in whose territory a permitted activity, in both the public and private sectors, was carried on exercised ultimate authority and that it would therefore make sense to refer to a primary liability of the State at the international level to provide compensation for the harm caused to other States or to their citizens. However, he agreed that, at the same time, a State should not have to bear the full cost of the harm caused and endorsed the view that a system should be established whereby regimes of State liability complemented each other.

315. The representatives in question therefore viewed the suggestion that liability might in some cases be imposed on the operator rather than on the State as, in the words of one of them, "a digression from the basic theme of the topic". In their opinion, liability should rest clearly with the State of origin, leaving it to domestic law to determine whether the operator should be obliged to indemnify the State.

316. Other representatives ruled out absolute or strict liability of the State. Thus, one representative deemed it inappropriate to treat the general rules of strict liability as general principles of international law in that area and further remarked that introducing the idea of strict liability seemed premature because views on that issue were divided even among the Commission's members. He added that where the notion of strict liability had been incorporated in existing international law it was more or less confined to ultra-hazardous activities as defined in the relevant multilateral conventions and that even in those conventions there was significant diversity as to the grounds for liability, the reasons for exemption, the allocation of liability, the extent to which the State was liable and the procedures for remedy. In his opinion, the concept of strict liability should be treated only in specific instruments covering well-defined areas. Another representative remarked that the principle that a State should bear full responsibility for

any activity that might take place within its frontiers was too simple and failed to take into account the role and responsibility of multinational corporations with independent financial resources and governing bodies answerable to no one but their shareholders.

317. According to those representatives, liability for harm should not fall on the State except on the basis of existing principles of State responsibility. Thus, one representative stressed that, where transboundary harm occurred which could not be attributed to any breach of legal obligations on the part of the State of origin, liability should not be assigned to the States, for States could not assume financial liability vis-à-vis non-nationals for all acts by private entities and individuals under their jurisdiction. Another representative, although not excluding the possibility that the State could be held liable when it conducted itself, through its organs or agents, the activity causing the harm, held that in principle the State could be held liable where it failed in its duty to take the necessary measures to prevent the harmful result - a duty which included the taking of such measures, by way of legislation, administration, supervision and enforcement, as were required in order to prevent or reduce to a minimum the risk of causing transboundary harm.

318. Many representatives held the view that direct liability for transboundary harm should lie with the operator rather than the State and that priority should be given to civil liability as a primary obligation in the current situation of liberalization and growing privatization of national economies. The specific case of transnational corporations was envisaged by some representatives. While one of them was of the view that the future convention should provide for the direct liability of transnational corporations operating in the territory of other States whose activities might cause transboundary harm, others drew attention to the complexity of the question. Thus, the remark was made that in the case of harm caused by the activities of transnational corporations, the question of State liability would give rise to great difficulty because the international community had not yet reached agreement on the legal status of multinational corporations or on a code of conduct to govern their activities. Attention was also drawn to the need to study in depth, as a separate matter, the special needs and limitations of financially weaker and developing countries and to take duly into account the dependence of such countries on foreign sources for technology and funding and even for their daily necessities in apportioning liability for activities conducted within their borders.

319. The prevailing trend was therefore in favour of a system of combined liability of the private operator and the State, in which the operator carried primary liability and the State residual liability. Attention was drawn in this context to the ongoing work in the International Atomic Energy Agency on the question of liability for nuclear damage and to the possibility of providing for the primary liability of the operator of the activity and a subsidiary or supplementary liability of the State in whose territory and with whose knowledge the activity took place.

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320. Some representatives, on the other hand, drew attention to the considerable difficulties which would arise from a possible combination, in respect of the same injury, of the civil liability of the operator and the liability of the State. One of them pointed out that legal traditions included a very wide range of principles of liability, including such concepts as that of "responsabilité pour risque du fait des choses", which were being applied with increasing frequency to environmental harm, inter alia, in cases involving a transboundary element, so that transboundary pollution was governed principally by international private law, international public law intervening only in order to harmonize private liability regimes and helping to resolve conflicts of laws or jurisdictions. Another representative, sharing the same concern, suggested that a study be undertaken of internal legislation in those fields, including laws covering insurance and those applicable to specific sectors such as transport or other activities the effects of which went beyond the territory of one State or which actually took place in areas outside the jurisdiction and control of any State.

321. The need to further clarify the extent of the liability of the State for transboundary harm caused by private entities and to elucidate the interrelationship between State-liability and civil-liability regimes was acknowledged by several representatives. The various obligations of the State of origin which were mentioned in this context are indicated below.

322. Some representatives singled out the obligation of the sovereign territorial State to adopt legislative and administrative provisions aimed at limiting the risk of harm and ensuring that those provisions were complied with. One of them remarked that the State incurred responsibility if it failed in its duty of prevention (i.e., failed to take unilateral preventive measures or to respect those that were mandated).

323. Mention was further made of the obligation of States to ensure, through their regulatory system, that the operator was liable for transboundary harm and had funds available to cover compensation payments. In this context, it was suggested that States should be encouraged to use existing civil liability regimes as well and to elaborate corresponding domestic and international regimes. The Commission was invited to help States in that respect by, for example, drafting model clauses on civil liability which States could consider adopting in their domestic law.

324. Some representatives also referred to the duty of States to ensure that their domestic law provided remedies to enable victims to obtain redress in their courts or to obtain prompt and adequate compensation by other means. It was stressed in particular that the principle of equality of access to courts and equality of treatment of victims, whatever their nationality or place of residence, would ensure that the system of civil liability of the operator was upheld. Other comments in this area included the remark that the State of origin should not be allowed to invoke immunity of jurisdiction, the suggestion that provision be made for public defence lawyers who could defend innocent victims in the courts of the State of origin and the observation that States should be encouraged to strengthen their international arrangements for

reciprocal recognition of civil jurisdiction and enforcement of civil judgements. In the view of one representative, State responsibility should be engaged for failure by the State to provide adequate civil remedies.

325. While, as has been seen above, some representatives held the view that liability, whether strict or residual, should not be imposed on States not in breach of obligation unless by virtue of instruments designed to deal with specific problems, other representatives were of the view that there were situations where, even if the State concerned had complied with its obligations, it might still have a residual liability based on risk, on the profit it derived from the activity and indeed on the principle of equity. Attention was drawn to circumstances where the civil liability of the operator was not in itself sufficient to safeguard the interests of the victim. Reference was made in particular to the eventuality that the operator might prove impossible or difficult to identify or might claim insolvency on the grounds of the scale of compensation. Mention was also made of the possibility that the agreements entered into by the State under which compensation was to be provided in whole or in part by the operator through a civil liability regime might not provide full compensation, for example, because the agreement provided limitations or exonerations of liability.

326. In this context the question was raised whether individual claimants should first exhaust local remedies before resorting to the international remedies to be provided in the proposed instrument. One representative answered in the affirmative. The prevailing view was, however, that a claim asserting State liability did not necessarily require the exhaustion of civil liability procedures. One representative, after recalling that in the case of absolute liability the person or persons who suffered the damage (the State and/or individuals or legal entities) would be able to claim compensation whereas in the case of classic international responsibility for an illegal act only States would have the right to seek reparation, and after pointing out that States, through the exercise of diplomatic protection, could secure reparations for damage suffered by individuals, remarked that it would be unjust to require that an individual first exhaust domestic remedies in the State of origin of the activity since there was no connection between the innocent victim and the State of origin. Another representative suggested adoption of a solution similar to that provided for in the Convention on International Liability for Damage Caused by Space Objects, which gave the victim of damage the possibility of presenting a claim for compensation to the "author" State at the inter-State level without having first exhausted local remedies but excluded the admissibility of a claim at the inter-State level if the victim had decided to take advantage of local remedies available in the "author" State. A third representative remarked that there would be merit in establishing coordinating mechanisms to encourage the affected State to introduce a "consolidated claim", or in introducing regulations concerning the "coexistence" of the international claim and actions in national courts.

327. Some representatives insisted on the need to provide for situations when transboundary harm was so vast that it called for compensation that exceeded the capacity of the State concerned. One of them drew attention to the

specific circumstances in developing countries which, due to lack of financial resources, might not be in a position to compensate the victim. He suggested that there be established for such purposes a special fund to be financed by States according to a scale reflecting their economic status. Along the same lines, another representative referred to the question of urgent assistance in cases of environmental emergency. He suggested that provisions be made for establishing machinery for effectively mobilizing the efforts of the international community in order to mitigate the consequences of the harm caused, and that a compensation fund for such emergencies also be envisaged. Mention was made in this context of the International Convention of 1971 on the Establishment of an International Fund for Compensation for Oil Pollution Damage and the Convention of 1988 on the Regulation of Antarctic Mineral Resources Activities.

5. The title of the topic

328. The divergences of views on the basic premises underlying the topic which are reflected in the sections above were also apparent in the discussions on the title of the topic. This question was viewed as unimportant by one representative but as closely related to the Commission's mandate by others.

329. Comments centred on three aspects, namely, the need to focus the title on the actual subject-matter of the draft, the reference to "acts not prohibited by international law" and the substitution of the term "activities" for the term "acts".

330. On the first point, one representative felt that the current title gave the topic a very wide scope, with the result that it could now be viewed as encompassing, in fact, all inter-State relations, except such conduct as was prohibited by treaty or by the generally recognized rules of customary international law. Along the same lines, another representative observed that, while the draft dealt exclusively with activities having a bearing on the environment, the title could be read as covering other activities not prohibited by international law, such as financial, trade or traffic activities.

331. Also referring to the need to bring the title in line with the content of the draft, one representative remarked that liability, the key word in the existing title, was dealt with in only one part of the draft instrument, while the provisions on international cooperation in preventing injurious consequences were equally important in the text and were obviously more acceptable to States.

332. As regards the reference to "acts not prohibited by international law", one representative, after pointing out that it appeared from the current title that the Commission had set out to make new law rather than to codify existing law, since there would otherwise have been no point in using the above-mentioned term in respect of injurious consequences, stressed that at the current stage the acts being dealt with were acts not prohibited by

international law, and that since the object of the draft articles would be to lay down principles relating to liability for injurious consequences, the Commission might consider adopting a different title for the proposed articles which would reflect that object.

333. The views reflected above found expression in a proposal seeking to simplify the current title so that it would read "International responsibility for transboundary harm". This proposal was supported by several representatives. On the other hand one representative, while agreeing that the title could be simplified, insisted that in the text itself it be made clear that the acts or activities referred to in the title were not prohibited by international law inasmuch as reparations for damage would otherwise be based on classic international responsibility.

334. On the third of the points mentioned in paragraph 329 above, the Special Rapporteur's proposal to align the English and Spanish versions of the title with the French text and to replace the word "acts" by "activities" elicited a wide measure of support. A number of representatives felt that the latter term reflected the subject-matter more appropriately than the word "acts" since the aim of the exercise was to prevent activities, including those carried out by non-State entities, from causing transboundary harm. One of them pointed out that liability for harm arising out of acts of the State not prohibited by international law and international liability for injurious consequences of activities not prohibited by international law were two different concepts inasmuch as the concept of lawful or wrongful acts connoted conduct directly attributable to the State and brought to mind the situations mentioned in the draft articles on State responsibility under the heading "Circumstances precluding wrongfulness".

335. The suggested replacement of the word "acts" by "activities" gave rise to another set of comments. One representative viewed it as entailing no fundamental change in the terms of the mandate of the Commission which had in no way envisaged a "wrongful act" as a specific and isolated act but had determined that it could be an act "having a continuing character" or a "series of actions or omissions" (article 25 of the draft articles on State responsibility). He therefore saw no difficulty with the proposed change. Other representatives expressed uneasiness about the growing trend in the Commission towards replacing the word "acts" by "activities". One of them recalled that, in fact, it was the act of pollution which had given rise to liability in the Trail Smelter case even though the activities causing the pollution had occurred over a lengthy period of time. Another representative remarked that, while the rules on prevention should obviously cover the concept of continuing activities, it was not obvious that the same concept should be applied to the provisions on liability. He pointed out in this connection that harm might be caused by isolated acts, and that the general principles underlying the topic seemed to suggest that such acts should also give rise to liability.

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6. The form which the outcome of the Commission's work should take

336. Some representatives held that the question of the nature of the instrument being drafted should be decided soon. One of them remarked that, depending on that decision, the content of the rules adopted and their drafting could differ widely and another pointed out that the continued ambivalence as to what kind of instrument the Commission should be working on was impeding progress.

337. The prevailing opinion was however that a decision on this point could be delayed until more progress had been made on the topic. Attention was drawn in this respect to the fact that the Commission did not normally discuss such matters on first reading and that, in any event, the final decision on the status and format of the draft articles would have to be taken by the Committee. More specifically, the view was expressed that it was too early to decide whether the fruit of the Commission's work should ultimately be adopted in a binding or non-binding form, as that decision would depend on the ultimate content of the Commission's draft articles. In this connection, one representative observed that before determining what kind of legal instrument or instruments should be prepared the Commission should clarify the types of harm to be covered by the draft articles. He pointed out that existing conventions covering specific activities provided for a variety of distinct liability regimes: for example, air traffic accidents were covered mainly by civil liability, whereas in the case of nuclear accidents there was both civil and State liability and, in the case of damage caused by space objects, the State was exclusively responsible. He furthermore remarked that, with environmental problems, the nature of liability varied depending on whether harm had been caused to the atmosphere, the ocean or land. He therefore concluded that it would be difficult for the Commission to determine the nature of the proposed instrument without first clarifying and categorizing the types of harm to be covered.

338. The above notwithstanding, a number of representatives indicated their preference as to the type of instrument to be elaborated.

339. Some representatives felt that the Commission should focus on, in the words of one representative, the drafting of a set of coherent, rational and politically acceptable articles, or, as another representative put it, the preparation of guidelines or principles, on the basis of an analysis of State practice, rather than the elaboration of a draft convention. One representative in particular questioned whether it was indeed realistic for the Commission still to endeavour to formulate a general multilateral convention on the topic or whether it would be preferable to consider alternatives, such as the conclusion of bilateral agreements and regional multilateral agreements between States regarding specific activities of a particularly dangerous nature, or a declaration of general principles by the General Assembly along the lines of that being prepared by the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space regarding the use of nuclear-power sources in outer space.

340. Other representatives favoured in general terms a binding instrument, an approach which, it was stated, was in line with the Commission's raison d'être and would best serve the task of the codification and progressive development of international law. The remark was made in this context that treaties had a greater impact on the behaviour of States, and doubts were expressed on the advisability of elaborating "soft law" on a topic of such importance. A code of guidelines was viewed as a clearly inadequate response to the enormous needs of the international community and it was considered wiser, at least in the early stages, to allow States that did not accept international responsibility for the damage they caused to the environments of other States or to the "global commons" to remain outside the convention, on the assumption that the principles embodied in a properly elaborated convention would almost certainly evolve into customary law, thus making it a "law-making convention" which would eventually be binding on all States.

341. Some among those representatives described the binding instrument to be elaborated as a "framework convention" containing provisions of a residual character which would allow arrangements to be made at the bilateral and regional levels. The remark was made that such an "umbrella" convention would provide essential principles and rules on the question of liability and thereby create a general institutional charter governing all aspects of international liability for injurious consequences arising in stated circumstances, from which bilateral or other multilateral agreements could draw inspiration and which would thus facilitate and encourage the conclusion of such agreements. Such a framework agreement was viewed as having the value of a code of conduct or a set of guidelines or recommendations to serve as a reference for States when drawing up separate conventions. The flexibility inherent in the framework convention approach was deemed all the more important as the economic and financial situation of States might greatly influence their attitude to the provisions adopted and make it difficult, if not impossible, to apply the same standards for liability and fixing of compensation without taking such circumstances into account. Also for the sake of flexibility, some representatives favoured a binding framework convention, with the option of treating some parts of the topic in the form of guidelines or recommendations, perhaps with annexes on particular issues.

342. Some representatives, while favouring the elaboration of a framework convention, drew attention to the complexity of such an undertaking. Thus, one representative observed that if the Commission was going to draw up a general framework agreement, the relationship between that agreement and existing conventions on specific activities, as well as agreements likely to be concluded on either a bilateral or a multilateral basis in the future, should be made completely clear. Another representative remarked that, in an area where numerous conventions regulated specific dangerous or harmful activities, the only chance for consensus seemed to lie in the elaboration of a simple, brief and principle-based instrument of a more general and simpler type than the current draft.

343. Also on account of the complexity of the topic, some representatives wondered if it was wise to try to cover all the aspects of the topic in a

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binding instrument. One representative in particular said that the Commission should not feel that its work must lead to an outcome either wholly binding or wholly non-binding, adding that obligations which could be precisely defined might be given legally binding status, while those which were general and wide-ranging might more appropriately become guidelines. The possibility of dividing the draft articles into two instruments, one representing "hard law" and the other "soft law", met with a measure of support. One representative pointed out that although many global and regional instruments already existed on environmental protection, and particularly on the prevention and abatement of marine pollution, it was also true that States avoided accepting provisions on liability. After recalling that even in cases of catastrophes such as that of Chernobyl, States reacted by concluding treaties on early notification, assistance and other similarly important and, for them, more acceptable responsibilities in respect of environmental protection, rather than by discussing and applying civil liability and compensation, he warned that States might not be extremely enthusiastic about adopting and ratifying a convention containing elaborate rules on civil liability. Another representative stressed that, in view of the legal difficulties involved in establishing a causal relationship between prevention and reparation, the suggestion that the Commission might contemplate drafting two separate instruments, one dealing with liability and the other with prevention, seemed to open the way to an acceptable arrangement. A third representative drew a distinction between procedural measures and unilateral measures of prevention. He supported the predominant view in the Commission that a separate, non-binding instrument on prevention, which would include the procedural obligations of States, should be drawn up and could take the form of recommendations, guidelines or model rules to be adopted by States in connection with a specific activity, an approach which would dispose of the controversial concept of "activities involving risk". He at the same time suggested that an instrument providing for unilateral measures of prevention be elaborated in the form of a framework convention or standards of behaviour with binding force. He added that, since the difference between State responsibility and State liability depended on whether the State was at fault, drafting two separate instruments, as proposed earlier, would mean that State liability would be entailed only if the State was carrying out a hazardous activity.

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E. RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)

344. A number of representatives took note with satisfaction of the progress achieved by the Commission at its last session on this topic. That progress was described as modest but meaningful by one representative, who welcomed the efforts made to establish a solid legal basis for cooperation through international organizations of a universal character. Another representative noted that the Commission had accelerated its work in this area and expressed the hope that work on the topic could be completed before the end of the Commission's forthcoming mandate.

345. Other representatives, although acknowledging the value of the work done by the Commission and its Special Rapporteur, placed emphasis on the difficulties inherent in the topic. One of them considered it doubtful whether a common regime could be defined for all international intergovernmental organizations, or at least for most of them. In his view, trying to cover the institutions of the United Nations system, similar organizations having world-wide competence and even such regional organizations as those covered by Chapter VIII of the Charter was too ambitious. After advocating a functional approach, whereby the precise privileges and immunities appropriate to the aims and powers of each organization should be determined case by case, he pointed out that, assuming one could realistically envisage the formulation of "minimal rules" applicable to all international organizations, to be supplemented case by case, the draft discussed by the Commission could not be described as "minimal". He urged the greatest caution in contemplating the possibility of supplementing existing agreements between States and international organizations. Another representative drew attention to a fundamental problem which arose in connection with the topic. He pointed out that, while one of the main criteria for determining the extent of the privileges and immunities to be accorded to a given organization was its functional requirements, each organization had its own characteristics and hence a different need for privileges and immunities. In his view, therefore, to prepare binding uniform rules to apply generally to international organizations of a universal character was difficult, and it might be better if the Commission directed its work on the topic towards developing guidelines and recommendations to be adopted by States and international organizations as they saw fit. A third representative drew attention to the problems encountered with regard to the Vienna Convention on the Representation of States in their Relations with International Organizations and invited the Commission to re-examine its purpose in considering the topic against that background. A fourth representative, while recognizing that it would be useful to have a codifying instrument setting forth the generally accepted norms in this area, doubted that the topic was a priority for the Commission.

346. The successive reports of the Special Rapporteur and the articles contained therein were viewed by several representatives as constituting a useful summary of the contemporary practice of States and international organizations and a suitable adaptation of the rules of diplomatic law to the

specific situation of international officials and their activities. It was also remarked that the drafts were based on existing multilateral conventions and on the headquarters agreements concluded by international organizations so that an early and successful outcome of the Commission's work on the topic could be envisaged.

347. The specific subjects of the confidentiality of the archives of international organizations and exemption from taxes and customs duties, dealt with in the fifth and sixth reports, were viewed as being of unquestionable interest. The relevant draft articles were described as consistent with the existing practice of securing the maximum facilities for international organizations, subject to the legitimate requirements of the host State. It was remarked that, while discussions on those subjects rightly highlighted the need to take account of new methods of transmitting and recording information, for example by computer technology or satellite, they also showed the great difficulty, if not the impossibility, of formulating common rules for organizations whose activities and needs were different.

348. Comments on individual draft articles included the following. As regards article 12, the purpose of which was to establish the inviolability of the archives of international organizations, the remark was made that such inviolability was based on the principle of the independence of international organizations, which was a prerequisite for the effective performance of their functions. While that principle was viewed as unobjectionable, it was suggested that the definition of archives be broadened to include modern means of communication such as computer files, electronic mail and satellite communication. It was also proposed that paragraphs 1 and 2 be combined into a single paragraph and that the words "in general" in paragraph 1 be replaced by the words "in particular".

349. Article 13, concerning the free circulation and distribution of publications and public information material, was described as essential to the functioning of international organizations. It was suggested that the list of material be broadened to include "high-tech" materials such as magnetic disks, diskettes and computerized products. The remark was also made that the words "necessary for their activities" underscored the functional test.

350. The second sentence of article 14, requiring the consent of the host State for the installation and use by an international organization of a wireless transmitter, was described as restrictive and unwarranted in the light of the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies.

351. Article 15 was viewed as incomplete, inasmuch as it omitted the question of censorship of official communications, in particular censorship that could be imposed by a host State prior to the issuance of communications. Another view was that the first clause appeared to be covered by article 12, paragraph 1, and that the second clause might be superfluous.

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352. The remark was made that article 16 would be contingent on any of the relevant provisions of a future convention on the diplomatic courier and the diplomatic bag that might be applicable to the diplomatic bag of international organizations.

353. Agreement was expressed with the view expressed in paragraph 293 of the Commission's report that article 17 was "too restrictive for the [needs] of the international organizations" and that it was "too much in favour of the interests of States".

354. Article 18, which set forth the general principle that the property and income belonging to an international organization and intended for official activities were exempt from direct taxation, was considered as generally acceptable. It was, however, suggested that consideration be given to incorporating in the commentary explanations of the terms "direct taxes", "indirect taxes" and "official activities" based on State practice. A further remark was that the more general term of "charges" might be more appropriate than the term "taxes", taking into account the latter part of section 7 (a) of the Convention on the Privileges and Immunities of the United Nations, which referred to "charges" in contradistinction to "taxes", the latter being transferred to the treasury of the State.

355. The distinction between the expression "for public utility services" in article 18 and the expression "for specific services rendered" in article 19 was viewed as unclear, and the suggestion was made that the two articles be harmonized, since they dealt with similar subjects.

356. Article 20 was considered as being in conformity with the norms laid down in the international conventions on privileges and immunities of international organizations. It was, however, suggested that the commentary should contain an explanation of the meaning and scope of the terms "official use" and "official activities".

357. General support was expressed for the text of article 21, subject to the replacement of the word "large" in paragraph 2 by the word "important", which provided a qualitative test. Another suggestion was to replace, in paragraph 1, the words "in principle", which had no legal effect, by the words "as a general rule".

358. Lastly, the hope was expressed that the draft articles would contain a provision stating explicitly that the privileges and immunities were intended for the efficient performance of the functions of international organizations.

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F. STATE RESPONSIBILITY

1. General comments

359. This topic was generally recognized as being of great importance and relevance, even though one representative envisaged the possibility that it might not yet be ripe for codification - which, in his view, would warrant suspending its consideration until changing circumstances offered better prospects for completing the exercise.

360. A number of representatives regretted that owing to lack of time the Commission at its last session had been unable to enter into substantive discussion of the topic and reserved the possibility of supplementing their observations at the next session of the General Assembly.

361. The Commission was urged to give a high priority to the topic, which had been on its agenda for several decades, and to embark on a thorough consideration of this crucial chapter of international law during its next and following sessions, so that the codification effort could move forward in a speedy and structured manner. More specifically, the Commission was encouraged by several delegations to take advantage of its shortened agenda to finalize its work on the topic, or at least to begin the second reading of the draft articles, during its next quinquennium.

362. At the same time, some representatives cautioned against undue haste. One of them invited the Commission to proceed very carefully to ensure that, once adopted in the form of a convention, the draft articles would attract the widest possible adherence by States, given the enormous effort and time which had been invested in them. Another representative encouraged the Commission to embody to the greatest possible extent in its draft the extensive judicial practice on the subject, in the form of arbitral awards and decisions taken by courts and by the International Court of Justice, which was the primary source for the draft articles.

2. The proposed structure of parts two and three

363. Attention was drawn to the fact that, according to the outline of work presented by the Special Rapporteur on the topic, part two of the draft articles was to be divided into four sections covering, respectively, (i) the substantive consequences of ordinary internationally wrongful acts, "delicts"; (ii) the instrumental consequences of such wrongful acts; (iii) the substantive consequences of international crimes of States as defined in article 19 of part one; and (iv) the instrumental consequences of such crimes. It was recalled that substantive consequences encompassed cessation of the wrongful conduct, restitution in kind, pecuniary compensation, satisfaction and other forms of reparation, while instrumental consequences meant countermeasures or what less recent doctrine had described as reprisals, plus any other kind of measures or sanctions possibly to be envisaged in response to an internationally wrongful act and especially to an international

crime. As for part three, which was to cover the implementation of the rules on State responsibility, it was recalled that the Special Rapporteur had proposed to devote it exclusively to the procedures for settlement of the disputes which might arise in the interpretation and application of parts one and two.

364. The remark was made that the object of the layout was to ensure adequate treatment of the draft's most delicate and practically most significant provisions, those concerning the determination of (i) the rights and obligations of alleged victims and alleged wrongdoers, or, in other words, the substantive consequences; (ii) the countermeasures the victim could take in order to obtain redress, and the conditions and limits of lawful resort to such countermeasures; and (iii) the settlement procedures to be made available in order to ensure an equitable outcome of the crisis opened by an alleged internationally wrongful act or by the countermeasures taken in reaction thereto. The view was expressed that in order to enable the Commission to deal adequately with such problems it seemed indispensable to attain at least the same degree of articulation as that achieved by the 35 articles of part one.

365. Commenting on this proposed structure, some representatives stressed that it might be appropriate to draw a distinction between the responsibility of a State in respect of a breach of the peace and security of mankind and a breach of its other international obligations, in such a way that the consequences of violating a double-taxation agreement, for example, would be different from those arising from a violation of the prohibition on the use of armed force.

366. Another representative remarked that, with regard to the substantive consequences of delicts, the Drafting Committee would be faced with a number of delicate choices, some of which would be related to the distinction between physical and moral damage and, in particular, to the treatment of moral damage to the injured State as distinct from moral damage to its nationals. He further referred to another problem which was closely linked to that of moral damage to the injured State, namely the problem of the role to be accorded to the controversial institution of "satisfaction" in the technical sense of the term, or, in other words, satisfaction as a typically international remedy, as distinguished from pecuniary compensation.

367. Support was expressed for the idea that the draft articles should contain a third part devoted to the settlement of disputes and methods of carrying out international responsibility. In this context, the view was expressed that an optional protocol should be prepared on the compulsory jurisdiction of the International Court of Justice with respect to disputes arising from internationally wrongful acts.

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3. The "instrumental" consequences of an internationally wrongful act

368. Several representatives welcomed the opportunity to discuss what was described as one of the most difficult aspects of the whole topic, namely, the scope of a State's right to take self-enforcing measures in order to redress an internationally wrongful act and to obtain guarantees of non-repetition. The use of the generic term "reprisals" to designate such measures gave rise to reservations since that term had long been associated with the use of force, and it was generally agreed that any act of reprisal involving force was *per se* unlawful. It was suggested that a more neutral term should be substituted, such as "response".

369. Some representatives stressed that drafting articles on the regime of countermeasures involved an effort of progressive development of the law. One of them remarked in this context that the difficulties posed by the subject of countermeasures were twofold: first, the subject had hardly any similarity to the regime of responsibility within national legal systems; secondly, the lack of an adequate institutional framework in the "society of States" made it very difficult to determine the features of any regulation of the conduct of States. He observed that, on the one hand, all States had a tendency not to accept any authority above themselves while on the other hand, and despite the principle of equality, factual inequalities tempted stronger States to impose their economic, if not military power. He concluded that one of the crucial aspects of the Commission's task appeared to be to find ways, through a combination of the best of *lex lata* with prudent but not unimaginative progressive development, of reducing the impact of the great inequality among States, failing adequate third-party settlement commitments, in the exercise of their *faculté* (and possibly obligation) to apply countermeasures. While agreeing that progressive development could be eased by the elimination of the main source of ideological conflict, he pointed out that other signs which had recently come to the fore were still difficult to interpret, notably the ambiguous concept of a "new international order". The serious crisis which had caused the concept to be evoked had also had, in his opinion, interesting repercussions which bore directly upon State responsibility.

370. Another representative shared the view that existing international practice, which was changing rapidly, should be carefully examined before finalizing specific provisions establishing what means were available to the injured State in responding to a violation of international law.

371. Some delegations concurred with the view expressed in paragraph 313 of the Commission's report that if responses were to be lawful, an internationally wrongful act must in fact have occurred, and that a bona fide belief that such an act had been committed would not be sufficient to justify lawful instrumental measures. It was furthermore remarked that in case no wrongful act had been committed, such measures would be adopted at the risk of the responding State and would entail its international responsibility.

372. Regarding the functions and purposes of the measures under consideration, one representative, while agreeing with the Special Rapporteur that measures might have both restitutive and penal functions, pointed out that that duality obscured the distinction drawn by the Special Rapporteur between instrumental or procedural consequences and substantive consequences. He observed that the overlap between those two categories could be seen in the fact that instrumental measures could be employed to secure substantive remedies and that there would be less of an overlap if the remedies were differentiated on the basis of those which vested solely in one party, namely the affected State, and those which vested in all States, either individually or jointly, the distinguishing feature being that a failure on the part of the delinquent State to repair the wrong would, in the appropriate circumstances, be seen as a secondary wrong. The same representative noted that the attribution of retributive functions to countermeasures was difficult to accept, since the international community regarded the adoption of punitive measures against coequal States as abhorrent. He suggested accordingly that the retributive function should be accorded a secondary status and should be applied only where there was a gross abuse of the law, with grave repercussions on the affected State, while great significance should be attached to the compensatory and reparative aspects of countermeasures.

373. To the question, dealt with in paragraph 315 of the Commission's report, whether prior claims of cessation, reparation and compensation should always be regarded as the mandatory first step in a graduated process of responses, one representative answered in the affirmative, though in his view, it was preferable not to draw distinctions of dolus in the issuance of preliminary demands, even where the delict was continuing. In his opinion, claims could be dispensed with where grave danger to life and limb and irreparable harm to property were imminent, provided that the measures adopted were consistent with preventing the recurrence of such situations.

374. Some representatives also commented on the question, raised in paragraph 316 of the report, whether responses could lawfully be undertaken by the injured State before it resorted to one or more of the dispute settlement procedures provided in Article 33 of the Charter. One of them remarked that, generally speaking, it was acknowledged that first resort must be to procedures for a peaceful settlement of disputes and that injured States could not take countermeasures until those procedures had been exhausted, and no longer enjoyed the unilateral right to exercise judgement in such matters. Another representative took the view that, to the extent that the impugned delict breached or threatened to breach international peace and security, Article 33 became ipso facto operational and must therefore be satisfied whereas, where no such international situations existed, Article 33 would not be applicable and the rules under the proposed instrument would take precedence. As for interim measures preceding prior demands, he observed that they were difficult to accept, because they were open to abuse and were conducive to an escalation of hostility.

375. Various views were expressed on the question of the proportionality between countermeasures and the alleged wrongful act. While one delegation welcomed the Special Rapporteur's intention to pay particular attention to this fundamental problem and to try to express that principle more rigorously, another noted that the principle of proportionality of response, although clearly established, gave rise to difficult problems which might themselves engender new disputes and create situations of conflict. Because of the difficulties inherent in the concept, one representative considered it inappropriate to attempt to formulate a definition of proportionality. According to that representative, the relationship between proportionality and other criteria, such as the nature of the delict and the damage caused, was best kept flexible so that the scope of application of the concept would remain as wide as possible, and at any rate responses which exceeded proportionality could themselves create responsibility for the responding State.

376. As regards the proposal, reflected in paragraph 318 of the Commission's report, to draft rules on the suspension and the termination of treaties in response to an internationally wrongful act, one representative questioned the advisability of making reference in the draft articles to this area of international law, which was regulated by the 1969 Vienna Convention on the Law of Treaties. Another representative expressed the view that the suspension or the termination of a treaty, which transgressed the fundamental doctrine of pacta sunt servanda, could only be justifiable, in accordance with article 60 of the 1969 Vienna Convention on the Law of Treaties, where the wrongful acts were closely linked with the purposes of the treaty itself. He raised the question whether a material breach of a multilateral treaty creating indivisible rights between parties necessarily entitled any one or more of the parties to suspend the treaty with respect to itself, as provided for in article 60, paragraph 2 (c), of the Convention. He further observed that suspension of treaties by every affected party would lead to the collapse of the treaty regime and accordingly concluded that "self-contained regimes", which by definition were indivisible, should be excluded from the measures of suspension and termination, thereby giving full rein to the collective dispute-settlement machinery.

377. Referring to paragraph 319 of the Commission's report, one representative shared the Special Rapporteur's scepticism with regard to the distinction between "directly" injured and "indirectly" injured States, a distinction which was difficult to apply in specific cases, especially in those cases where States tended to fall into both categories. He considered it more useful to emphasize that where there was a delict there was a remedy, the scope of which depended on the nature of the delict and which must be compatible with the degree of injury suffered, provided that the injury was assessed according to objective criteria. Hence, he concluded, as long as a State could show substantial wrongdoing on the part of the offending State, there would be a right of proportionate response.

378. A number of delegations endorsed the Special Rapporteur's view, reflected in paragraphs 320 to 322 of the report, that countermeasures could only be taken with due respect for the fundamental rules of international law (non-recourse to armed force, respect for human rights, respect for the inviolability of individuals and of premises protected under diplomatic law). The remark was made that, while limitations based on controversial rules, such as economic measures, would probably be ignored in practice, it should be provided that measures adopted in contravention of the above-mentioned fundamental rules would entail the responsibility of the concerned State. With specific reference to the prohibition of force, it was deemed desirable to bear in mind the various United Nations declarations and resolutions prohibiting armed reprisals, as well as the requirement in Article 2, paragraph 4, of the Charter and the rules and practice of the Security Council and of regional organizations.

379. As regards the Special Rapporteur's reference to jus cogens and erga omnes obligations, one representative expressed reservations on the concept of jus cogens as it appeared in the Vienna Convention on the Law of Treaties. Another representative, after noting that the question brought into focus the broadening of the topic from its traditional context of injury to aliens to the context in which the interests of international public order and of the international community must be taken into account, urged the Commission to take due account of the expectations of the international community and, in particular, of States that had gained their independence after the classical rules of international law on the topic had been formulated.

4. The notion of fault in the context of parts one and two of the draft articles

380. Emphasis was placed by some delegations on the need for the Commission to settle the difficult question of fault. One representative felt that the question, while perhaps rightly left vague in part one, could not be ignored if the consequences of wrongful conduct, dealt with in part two, were to be dealt with adequately. He pointed out that the question of the relevance of negligence or dolus in determining the nature and quality of reparation or the conditions and nature of the countermeasures which were lawfully applicable was of great importance with respect to the consequences of delicts and of paramount importance with respect to the consequences of crimes.

381. Another representative criticized part one of the draft articles for failing to openly address the question whether fault was a necessary element of State responsibility, a question whose solution would have important repercussions on the treatment of liability for the injurious consequences of lawful acts, since the scope of the latter subject was largely dependent on that of State responsibility. While agreeing that the general interest of the community of nations required more than ever that States strictly abide by their international obligations and that, in case of damage resulting from the breach of such obligations, swift reparation be made, he observed that a requirement of fault could become a paralysing factor if it permitted an

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author State to hide behind an alleged lack of fault and that, additionally, fault might be difficult to prove, so that many arguments militated in favour of reducing the role which fault might legitimately play within a system of State responsibility.

382. After noting that the absence of any mention of fault in part one of the draft articles seemed to indicate that that notion was alien to the law of State responsibility, he observed that the requirement in article 3 that there should be a breach of an international obligation might be dependent on further requirements. In this context, he raised the question whether breach of an international obligation was simply inconsistency between conduct required and actual conduct or involved, at some point, an element of fault. While noting that the text of article 16 seemed to suggest that an infringement of an international commitment was totally independent of whether the State concerned was actually in a position to live up to that commitment - an impression which was confirmed by articles 20, 21 and 23 and by the commentaries to articles 20 and 32 - he observed that in the commentary to article 23 the Commission had cautioned against attributing to a duty to prevent a given event the significance of an insurance against the occurrence of that event "regardless of any material possibility" of a State to actually control the relevant developments, a statement which was at variance with the text of article 23.

383. The representative in question remarked that, on the basis of the draft articles referred to above, one could be led to assume that, for instance, no complex elaboration of norms in the field of environment was necessary, since States would incur responsibility whenever, notwithstanding their obligation to respect the territorial integrity of their neighbours and to refrain from causing injury beyond their borders, damage to the environment occurred. Yet, he observed, the legal position was infinitely more complex and the question therefore arose of what was wrong with the articles under consideration. In this context he noted that the International Law Commission, while devoting lengthy developments to the "problems relating to the determination of the time and duration of the breach of an international obligation", had in fact dealt with the issue of fault without so acknowledging - an approach which the Commission's choice of terminology made even more confusing. He remarked that the suggested distinction between obligations of conduct and obligations of result contributed little to a clarification of the legal regime of State responsibility. To illustrate his point, he referred to article 2 of the Covenants on Human Rights and to article 6, paragraph 1, of the International Covenant on Civil and Political Rights which, in its first part ("Every human being has the inherent right to life"), determined a result to be achieved, but in its second part ("This right shall be protected by law") enjoined States to take specific action, namely by law. He observed in this connection that, in drawing up international treaties, States felt it increasingly useful to stress that concrete steps must be taken to pursue the aims agreed upon. He thus submitted that the suggested differentiation between obligations of conduct or means and obligations of result rested on a somewhat doubtful categorization which, in any event, was of secondary importance at best, whereas the gap left by the inconclusive and offhand treatment of the issue of

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fault might lead to tremendous difficulties in the practical application of a future conventional regime of State responsibility. He concluded that, even though articles 20, 21 and 23 might not be intended to lay down rules concerning the element of fault, they would certainly be interpreted as such and appeared, somewhat surprisingly, to establish a regime of strict or even absolute responsibility.

384. Reviewing the solutions that might be envisaged in reconsidering the issue, the representative concerned stressed that, while fault could conceivably be linked to the person called upon to act on behalf of the State, such a construction had been abandoned by international practice and jurisprudence and that, in keeping with the principle that States were under a general obligation to organize their internal mechanisms in such a way as to be able to live up to their international commitments, the draft articles rightly focused on acts of the State as such, which were mainly acts of organs of a State. Turning to the other extreme, namely a construction, apparently espoused by articles 20, 21 and 23 of part one of the draft articles, which viewed responsibility as the outcome of a mere comparison between the requirements specified by the international obligation concerned and the situation as it had developed de facto, he questioned whether such a system of strict or even absolute liability was consonant with the current state of customary international law and referred in that context to the findings of the International Court of Justice in the Corfu Channel case. He proposed as the correct solution, dictated by common sense and amply corroborated by State practice and international jurisprudence, to make it incumbent upon States, in the discharge of their international obligations, to employ all the means which could be reasonably expected of an entity enjoying sovereignty under international law and therefore recognized as the master of any developments within its territory. While agreeing that States could not be required to do the impossible, he insisted that they should as a minimum be capable of effectively ensuring the basic functions of public authority and to perform in a way corresponding to a yardstick determined by the general features of a well-organized State operating in accordance with the dictates of the rule of law. Starting from this premise, and analysing the reasons why the Commission had put the obligations of conduct or means under article 20 in a special category, he submitted that the true reason for denying any relevance to fault appeared to be the fact that a State which undertook to adopt specific, narrowly defined measures was generally prevented from invoking its inability to follow the course of action pledged by it. He referred in this context to the jurisprudence of the Court of Justice of the European Communities concerning delayed implementation of directives under article 189 (3) of the EEC Treaty which made it clear that a national legislature must be able to deliver what the State had pledged to perform. Here, he concluded, the question of fault became meaningless and the objective standard to be applied left no room for any loopholes.

385. Turning then to the situation where a State was required to bring about a specific material result outside the machinery it had established to discharge its functions (cases in point being the obligation to protect human life or to ensure everyone's right to work or, in the field of international relations,

the obligation to respect the territorial integrity of neighbouring States), the representative concerned pointed out that since States, notwithstanding their legal sovereignty, were not almighty entities, the application of the objective standard of good government might yield different results in different circumstances and that, essentially, nothing more would be required than due diligence, a test which, contrary to what was often held in legal writings, could be applied both to the omissions of a State and to its actions. In this context the representative referred to a recent case adjudicated by the European Court of Human Rights (judgement of 21 February 1990, Powell and Rayner A/172).

386. Summing up, the representative concerned stated that, while one of the draft articles failed to address squarely an important chapter of the law of State responsibility, suggesting instead in an indirect fashion solutions which might not really correspond to the intentions of its authors, the draft articles rightly emphasized that State conduct must be measured against a strict yardstick. In his view, the suggested distinction between obligations of conduct and obligations of result would appear to create more difficulties than it was able to settle, whereas a provision on fault highlighting the objectiveness of the test to be employed could be of great merit and would fit well into part one of the draft articles because fault was, in the Commission's parlance, an element of the secondary rules which were under elaboration.

387. The same representative observed that it was particularly in the field of environmental protection that stress had to be placed on the strictness of the standards to be observed. In his view, the proposition could not be challenged that a State carrying out activities with an inherent risk of harming other States had to take all appropriate measures to reduce and control that risk, and that lack of expertise could not justify a slackening of security standards to the detriment of other States. The real difficulties, he remarked, stemmed from uncertainties about the existence and scope of the relevant primary rules, and it was precisely to those uncertainties that the concept of liability for acts not prohibited by international law owed much of its importance. Analysing the reasons why the process of elaborating a consistent body of environmental norms had been so laborious, he suggested that for too long the view had prevailed that the relevant problems could be settled by resorting to general and abstract rules (such as principle 21 of the Stockholm Declaration of 1972, the principle of territorial integrity as opposed to territorial sovereignty or the maxim "sic utere tuo ut alienum non laedas", whose application in concrete cases gave rise to tremendous difficulties because none of them could be regarded as absolute. He therefore welcomed the trend, which had become increasingly pronounced in recent years and would doubtless receive another boost from the United Nations Conference on Environment and Development to be held in June 1992, towards setting forth environmental law in terms of concrete standards of behaviour addressed to any potential author State. He remarked that, concomitantly with that evolution, the room left for a system of liability for injurious consequences arising out of activities not prohibited by international law was bound to shrink, while that for classical State

responsibility would expand, a development which would represent a tremendous gain in legal certainty and clarity, since State responsibility, unlike a liability regime, was accepted in principle as an institution of customary international law. He none the less agreed that the proposition that the innocent victim should not be left to bear the loss it had suffered had lost nothing of its relevance through the legislative process of the recent past and that the situation of an unforeseen and unavoidable accident had not yet received a satisfactory legal answer inasmuch as responsibility could not arise as long as due diligence had been observed. He thus concluded that the progressive development of international law with a view to providing compensation to the victim within a context of liability was a primary necessity.

G. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

1. Programme of work of the Commission

(a) Current programme of work

388. Several representatives stressed that during the next quinquennium the Commission would have to complete its work on the topics which were still outstanding, namely, the law of the non-navigational uses of international watercourses; draft Code of Crimes against the Peace and Security of Mankind (and in this connection the view was expressed that the Commission was the most appropriate forum to elaborate a statute for an international criminal court); State responsibility for internationally wrongful acts; international liability for injurious consequences arising out of acts not prohibited by international law; and relations between States and international organizations (second part of the topic).

389. As regards the first two of these topics, one representative expressed the hope that the Commission would embark on the second reading of the draft Code of Crimes against the Peace and Security of Mankind and of the draft articles on the law of the non-navigational uses of international watercourses at its forty-fourth session, in 1992, without awaiting the comments and observations of States due to be submitted to the Secretary-General by 1 January 1993. In his view, any delay in the preparation of those important drafts was to be avoided. Another representative, however, felt that the Commission should proceed to the second reading of the draft Code of Crimes against the Peace and Security of Mankind and the draft articles on the law of the non-navigational uses of international watercourses, after receiving the observations and remarks of Member States.

390. A number of representatives insisted on the importance of the topic "State responsibility". One of them invited the Commission to concentrate in the immediate future on completing the first reading of the relevant draft articles, including reconsideration of the controversial part one with a view to eliminating article 19 and simplifying the text. The hope was expressed that the Commission would take advantage of its shortened agenda to advance

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its work both on State responsibility and on international liability for injurious consequences arising out of acts not prohibited by international law. A further view was that the Commission should focus attention on the three interrelated topics on State responsibility, which it should seek to complete in its next quinquennium, i.e., during the United Nations Decade of International Law, and that the three topics should be considered in parallel to enable the Sixth Committee to evaluate the entire field of State responsibility.

391. Some representatives expressed the view that the topic "Relations between States and international organizations (second part of the topic)" should not be treated as a priority one.

(b) Future programme of work

392. The efforts of the Commission's Working Group on Long-Term Programme of Work were acknowledged, as was also the attention which the Commission had paid to the issue at its forty-third session.

393. Emphasis was placed on the importance of the question from the point of view of the Commission's future as well as on the Sixth Committee's responsibility in guiding and directing the Commission in the choice of the right topics. Attention was also drawn to the complexity of the issue. In this connection one representative pointed out that since the establishment of the International Law Commission in 1947, one of the lessons of the experience of law reform agencies and commissions had been the phenomenon of the "second generation" problem. He observed that in their first phase such bodies had a natural agenda of items which everyone agreed should be taken up, cases in point being, in the case of the Commission, the law of the sea and the law of treaties, whereas "second generation" topics tended to be more difficult, controversial and less obviously useful. Such topics, he further remarked, were often interdisciplinary and, as a result of technological changes, cut across both the established categories of the law and the work of other agencies.

394. Some representatives remarked that the Commission's agenda would soon be reduced to three items and that it was therefore appropriate to start considering what further topics were suitable for inclusion in its agenda. The addition of new items would, it was stated, help to maintain continuity in the Commission's contribution to the codification and progressive development of international law.

395. Many other representatives felt that the Commission had enough to do for the next quinquennium with the items on its agenda and should concentrate on completing their consideration rather than dispersing its efforts on new topics, the more so as it ought to be at all times in a position to respond promptly to requests for advice from other institutions which might be engaged in codification tasks. Attention was drawn in this context to the statement in the report of the Working Group on Long-Term Programme of Work reproduced in the annex to the Commission's report, that one of the ways in which the

Commission could contribute to the objectives of the United Nations Decade of International Law would be to finalize the work on the topics currently on its agenda.

396. Sharing the view that the work in progress should first be completed, one representative expressed the opinion that there would probably be room for only one new topic during the next quinquennium.

397. While, as indicated above, the prevailing view was that no new topic should be included in the Commission's agenda at the current stage, a number of representatives none the less elaborated on the criteria which should in their view govern the selection of topics to be included in the long-term programme of work.

398. Many representatives agreed with the view, reflected in paragraph 2 of the annex to the Commission's report, that in selecting new topics account should be taken of the pressing needs of the international community at its current stage of development. Reference was made in this connection to the views expressed by the Committee of Legal Advisers on Public International Law of the Council of Europe.

399. In this context, some representatives insisted on the need to envisage the Commission's role in a more progressive spirit. Thus, one representative expressed the view that the Commission had in the past centred its attention on traditional international law, and that there might be an element of truth in a comment made by the United Nations Institute for Training and Research (UNITAR) in 1981 to the effect that the Sixth Committee had sometimes been reluctant to entrust high-priority issues to the Commission because it did not consider it to be receptive to innovation. In his view, the time had come for the Commission to embark upon topics which were different both in nature and in substance from those considered during the past four decades. Another representative similarly stressed that the process of codification of the major topics of international law was drawing to an end and the new needs of the international community lay in the area of the progressive development of international law in fields in which State practice had not yet established fixed rules. Also advocating a more modern approach and insisting on the need to adapt existing law to new realities, another representative drew attention to the ever-widening disparities between different countries in the economic sphere. Among the topics of an economic nature requiring legal regulation, one representative singled out the new international economic order. He recalled that the International Law Commission had taken up the study of the subject in 1978, and that its private law aspects were being studied by the United Nations Commission on International Trade Law (UNCITRAL). In his view, the International Law Commission, proceeding step by step, and beginning with the more pressing needs of the international community, might possibly consider the public law aspects of the new international economic order.

400. A second criterion mentioned by several representatives was the likelihood of achieving practical and generally acceptable results without any excessively theoretical discussion. In this connection, one representative

pointed out that it was not possible to know in advance how the Commission's work on a topic would evolve and that the test might therefore have to be the negative one of avoiding topics where eventual lack of general agreement seemed predictable. He stressed that, whether expressed positively or negatively, the point had an important bearing on the standing of the Commission's work, and thus of the Commission itself, within the international community. Another representative similarly noted that the harmful consequences of a potential failure of the Commission's endeavours on a given topic could hardly be overemphasized, adding that topics which gave rise to major controversy among States should preferably be avoided, as also should areas in which the necessary jurisprudence was lacking.

401. A third criterion which was mentioned was the time factor. Some representatives stressed that only those topics which were susceptible to completion in a few years' time should be selected. In this context, support was voiced for the Working Group's view as reflected in paragraph 7 of the annex to the Commission's report that most of the new topics should be susceptible to completion, if possible, within the Commission's next term, and the hope was expressed that now that the era of major codifications appeared to have ended, the Commission would arrive at conclusions more rapidly.

402. A fourth criterion which was mentioned was the need to select only such topics as fell within the scope of the Commission's competence.

403. A number of representatives commented on the list of topics drawn up by the Commission in paragraph 330 of its report. While one representative found that the topics had been judiciously chosen, the proposed list gave rise to many reservations or objections. It was said in particular that most of the topics did not fall within the purview of the Commission and were a matter for other specialized bodies (such as the Commission on Human Rights or the United Nations Commission on International Trade Law) or for regional forums or bilateral arrangements. The list was also criticized on the ground that it contained a number of topics which did not really lend themselves to codification. A further criticism was that most of the topics were not of such urgency or importance as to justify their inclusion in the list.

404. Several representatives specifically addressed the elements of the list contained in paragraph 330 of the Commission's report.

405. Topic (a), "The law of confined international groundwaters", was viewed by a number of representatives as worthy to be selected. It was said in particular that work in this area would usefully complement the draft articles on the law of the non-navigational uses of international watercourses and constitute an appropriate response to the growing interest in matters relating to the environment.

406. While agreeing that the time had come to elaborate generally acceptable rules of international law on the topic, some representatives felt that the problem of groundwaters should be regulated together with the problem of international watercourses. One of them suggested that this be done under the

general heading "Land waters", pointing out that land waters should be treated as one complex system, the way they existed in reality.

407. Still other representatives expressed reservations on the topic. One of them questioned whether the law of confined international groundwaters should be studied, as such waters constituted a very large percentage of the Earth's available drinking water. He added that before taking a decision concerning that topic it would be advisable to consider the extent to which such confined waters were used in human activities and how necessary international legal regulation thereof might be. Another representative wondered if the international community had sufficient technical information to be able to develop legal rules in that area.

408. Two representatives expressed interest in topic (b), "Extraterritorial application of national legislation", one of them stating that it was of interest to all States and appropriate for codification.

409. Topic (c), "The law concerning international migrations", elicited support on the part of some representatives, one of whom emphasized that current international law in this respect needed to be supplemented and that the whole subject might have to be regulated anew. A note of caution was, however, struck by another representative who felt that further reflection was needed in view of the changes taking place in this area.

410. As regards topic (d), "Extradition and judicial assistance", one representative felt that it would be useful to systematize the relevant legal rules in view of the abundance of regional, subregional and bilateral norms on the subject. Another representative suggested that the Commission should draw up a more precise plan of action in this area. In his view, the idea was worth pursuing, provided the goal was simply to compile a list of guidelines to help States in their bilateral and multilateral negotiations. Still another representative felt that there was no urgent need to regulate the problem on a universal basis and that the matter should be left to bilateral and regional treaties.

411. Topic (e), "The legal effects of resolutions of the United Nations", elicited interest or support on the part of several representatives, one of whom suggested that its title be changed to read "Effects of the acts of international organizations". The remark was made that an analysis of the legal effects of resolutions of the United Nations, prepared by a body with the Commission's reputation, would be very useful in assessing the role of those resolutions in the system of sources of contemporary international law. One representative recalled that in the debate held during the previous session his delegation had suggested that the Commission should consider, in the context of its long-term programme, the following issues: the implementation of United Nations resolutions and legal consequences arising out of their non-implementation, and the binding nature of Security Council resolutions in accordance with Article 25 of the Charter and the advisory opinion of the International Court of Justice on Namibia. He therefore noted with satisfaction that the Commission had included among possible topics for

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its long-term programme the legal effects of resolutions of the United Nations. After recalling that the Working Group on the Commission's Long-Term Programme of Work had found the resolutions of international organizations to be a fundamental element in the process of evolving rules of international law, with some of them often exercising greater influence on international relations than treaties, he noted that the question of the legal force of those resolutions remained controversial - which had prompted the Working Group to recommend that, at the outset at least, consideration should be confined to resolutions of the United Nations, with emphasis on those of the General Assembly and the Security Council, as well as on their degree of binding force, their effects, the circumstances of their adoption and their content. The same representative strongly urged that the item should be included in the Commission's long-term programme of work, adding that consideration could also be given to the question of the legal content of the notion of jus cogens, or peremptory norms of international law, the existence of which had been formally recognized in the 1969 Vienna Convention on the Law of Treaties. That issue, he pointed out, had been examined by various experts but had not received a detailed analysis in any international forum.

412. Some representatives on the other hand expressed reservations on the topic. One of them, while recognizing that the topic was particularly attractive for any international lawyer, questioned whether the Commission was an appropriate forum to deal with it. She stressed that, according to the law of international organizations, it was for the principal organs of the organizations themselves to make authoritative interpretations of their statutes, including provisions regulating the adoption of resolutions, their legal force, etc., and that it was, accordingly, for the General Assembly and the Security Council to decide on those issues. The view was also expressed that such an undertaking would be an academic exercise in view of the dynamic evolution of the United Nations itself.

413. Some representatives expressed special interest in the topics relating to economic issues, namely topics (f), (g) and (h). One of them, after observing that those topics impinged in one way or another on the economic sovereignty of developing nations and that many difficulties were involved, proposed that the Secretary-General should be authorized to carry out a study similar to the 1971 survey, to investigate the feasibility of codifying the three topics.

414. On topic (f), "International legal regulation of foreign indebtedness", one representative observed that it was a direct offshoot of the international debt crisis which had plagued the international community during the 1980s. He stressed that the position of the indebted States had been made still more difficult by the absence of rules of public international law relating to monetary matters and that there was consequently a need for the development of international rules relating to foreign debts. Another representative agreed that the subject was important but wondered if it was sufficiently mature for codification.

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415. Topic (g), "The legal conditions of capital investment and agreements pertaining thereto", was viewed by one representative as lending itself more readily to regulation through international law. The same representative stressed that the flow of capital from the industrialized West to the developing East had for some time formed the subject-matter of studies by economists and that the question arose whether the time had come for international regulation of foreign investment through law. Another representative felt that the topic should be dealt with in the framework of UNCITRAL.

416. Concerning topic (h), "Institutional arrangements concerning trade in commodities", one representative stressed that it raised yet another economic problem which in the past had created difficulties for countries dependent on export earnings from one or several commodities.

417. Other representatives, however, emphasized that it would be extremely difficult, from the technical point of view, to codify and develop new rules concerning the three topics relating to international economic law and to reconcile various economic interests, particularly those of the developed and the developing countries.

418. Topic (i), "Legal aspects of the protection of the environment of areas not subject to national jurisdiction (global commons)", gave rise to reservations on the part of one representative but elicited support on the part of a number of others. One of them insisted that its consideration by the Commission be preceded by some preliminary study, as there were serious questions as to what such a project might look like, what it might contribute to the corpus juris and how its provisions might relate to other texts dealing with the "global commons".

419. Topic (j), "Rights of national minorities", was viewed by one representative as falling within the purview of the Commission on Human Rights and by another as better left to regional arrangements. Another representative recalled that, following the Second World War, the issue had been poorly received in the United Nations and that, apart from article 27 of the International Covenant on Civil and Political Rights, no other legal rules had been adopted. After pointing out that a draft declaration on the rights of national, ethnic, religious and linguistic minorities, proposed by Yugoslavia in 1978, had not yet been adopted, he noted that the question had attracted renewed interest with the disappearance of the divisions in Europe, the most significant results being the adoption by the Conference on Security and Cooperation in Europe of a document signed at Copenhagen and the preparation of a draft convention by the Council of Europe. In his opinion, however, recent events had again demonstrated the impossibility of arriving at a satisfactory definition of national minorities. He concluded that the problem of minorities could not be studied and solved in isolation, as it was merely one aspect of the broader problems of multinational societies.

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420. Topic (k), "International commissions of inquiry (fact-finding)", elicited support on the part of some representatives, one of whom suggested that the Commission study in particular the role of such commissions as a means of settling international disputes in comparison with other means. Some other representatives pointed out that the question had been successfully dealt with, as far as the United Nations was concerned, in the framework of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization and that there was as a result no urgency for a global approach to the matter by the Commission.

421. As for item (l), "The legal aspects of disarmament", it was viewed as interesting by some representatives, one of whom suggested that it be entitled "Monitoring of the application of international law", a process which should include verification, now a very important institution under international law, although the legal provisions governing it were not widely known.

422. Two additional topics were suggested for inclusion in the list drawn up by the Commission, namely "The legal effects to be given to reservations and objections to reservations to multilateral conventions", and "Recognition of States, Governments and legal situations".

423. As for future action in this area, the representatives who spoke on the matter generally agreed that further reflection was necessary. Thus, one representative said that the choice of new topics should only be made after a careful analysis of the needs of the international community. Another representative stressed that an in-depth review of the Commission's future agenda was necessary.

424. As to the framework in which this reflection effort should be conducted, various views were expressed. Some representatives felt that it was for the General Assembly to indicate its priorities and to instruct the Commission to draw up the relevant drafts, while respecting the Commission's autonomy in carrying out its mandate. More specifically, it was suggested that informal consultations be held on the subject with participation of members of the Commission, or that the question of the Commission's future agenda be entrusted to a special working group.

425. Other representatives, however, held the view that consideration of the question should be resumed within the Commission itself. Thus, one representative suggested that the Commission take stock of its achievements and propose subjects which would allow it to fill potential loopholes or which had high priority in the contemporary world. Another representative said that it might be useful for the Commission or a small working group thereof to undertake a provisional preliminary study in order to give a clearer idea of what would be involved in the project, of what a set of draft articles on the topic might look like and of how it might relate to other texts or the work of other agencies.

426. As to the lines along which further reflection on the matter should proceed, one representative pointed out that the Commission's work on the major classical subjects of international law was now largely completed and that the time had come for a change of emphasis with regard to the subjects which the Commission should tackle, the procedures it should employ in doing so and the results to be expected from the conclusion of its work. After stressing that subjects for future consideration by the Commission would probably tend to be much more specific than in the past and would be required to meet the international community's practical needs, covering both specific short-term problems and, in new areas of international activity, the timely provision of a long-term legal framework, he remarked that the changes taking place within the international community were making traditional concepts of the codification of international law obsolete and that in a multi-structured world community with overlapping legal competences and a proliferation of treaty networks there was a need for coordination, with instruments which had become irrelevant or had been superseded being gradually discarded. In his view, the Commission might well be the appropriate body to undertake at least some of the work involved.

2. Methods of work of the Commission

(a) General observations

427. A number of representatives remarked that the current methods of work of the Commission had enabled it to achieve remarkable results in the course of the term of office of its members. It was pointed out that during that term of office the Commission had concluded its consideration of the topics "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" and "Jurisdictional immunities of States and their property" and had provisionally adopted draft articles on the draft Code of Crimes against the Peace and Security of Mankind and on the law of the non-navigational uses of international watercourses.

428. Some representatives stressed that those achievements, although they confirmed the Commission's effective contribution to the strengthening of international law, did not mean that the current working methods could not be improved. Indeed, it was observed, the Commission had streamlined its procedures in the recent past. Gratification was expressed at the fact that, even in the last year of the term now coming to an end, the Commission had recognized that changes needed to be made and had made them. To illustrate this point, one representative remarked that the Commission, instead of attempting to consider the substance of all the topics on each agenda, had adopted certain priorities, setting itself the target of adopting sets of draft articles on only three topics and, as everyone had noted, achieving that target. He added that such success had been due not only to the establishment of priorities but also in large part to the Commission's wise decision to allow two weeks of concentrated work by the Drafting Committee at the beginning of its forty-third session. Another innovation which was favourably commented upon concerned the steps taken to enable Special Rapporteurs to attend the meetings of the Sixth Committee devoted to the Commission's report.

429. Several representatives noted with satisfaction that the Commission was fully aware of the need to keep its procedures and working methods under constant review and intended to devote considerable attention to this aspect at its next session. In this connection, emphasis was placed on the need for the Commission to preserve its autonomy with respect to its methods of work, and the remark was made that it was clearly up to the Commission itself to adopt its own methods within the framework of its mandate and on the basis of the principle of self-organization.

(b) Pace of the Commission's work

430. Emphasis was placed on the need to avoid unnecessary delay between the introduction of a new topic and the final result.

431. Several representatives, while acknowledging that the Commission's methods of work had sometimes been viewed as too dilatory and that its rigorous deliberations were regarded by some as procrastination, observed that the answer to such criticism lay in achieving a balance between the demands of States for speedy development of legal regimes and the need for stability and accountability of such regimes, a balance which had largely been achieved by the Commission in the work of its last five years. Haste, it was remarked, could lead to texts lacking general support which would weaken instead of strengthen international law.

432. After stressing that one of the Sixth Committee's requirements was undoubtedly for a speedy reaction by the Commission in appropriate cases, one representative recalled that in its work on an international criminal court the Commission had shown that it could do extremely valuable work very quickly. He suggested that those possibilities be further developed and that attention be given in that context to finding ways of appointing Special Rapporteurs immediately after the General Assembly had referred a new and urgent subject to the Commission, permitting work on the subject to begin straight away, without having to wait for an appointment to be made at the following summer's session, so that in most cases a year was effectively lost before work could really begin. He added that the Sixth Committee should not hesitate in appropriate cases to indicate time-limits by which it would wish to receive the Commission's views on a particular topic. Elaborating on this idea, another representative suggested that the time-limit set for the consideration of matters referred to the Commission might coincide with the term of office of its members and that, if consideration of a topic could not be completed within that time, the Sixth Committee would then have to decide whether it was suitable for codification or whether its further consideration should be postponed to more auspicious times.

(c) Special Rapporteurs system

433. A number of representatives wondered if the Special Rapporteurs system as a whole still responded in the most effective way possible to the needs of the 1990s. Some advocated greater use of small working groups and friends of the Special Rapporteur, as envisaged in article 16 (d) of the Commission's

statute. One of them observed that if the Special Rapporteurs were assisted by two or three of their colleagues, a wider range of views would be reflected in their reports, the consideration of those reports would be facilitated and the texts emerging from the Commission would stand a better chance to be accepted by States. While finding merit in this approach, one representative reiterated his view that the increasing complexity of the issues before the Commission and the growing need for speed made it highly advisable to divide work more evenly among the 34 members of the Commission, perhaps by appointing two co-Rapporteurs for each topic in addition to the Special Rapporteur. Another representative, while having no objection to the establishment of small working groups as long as members of the Commission were not prevented from participating fully in the adoption of all decisions, expressed strong opposition to the creation of subcommissions.

(d) End results of the Commission's work

434. Some representatives remarked that the traditional pattern of preparing a set of draft articles with a view to the holding of a conference at which a convention might be adopted seemed less appropriate than in the past. It was observed that legal guidelines, or a framework of legal principles, or draft model articles, might all in appropriate cases be of greater practical value than draft articles designed to be adopted at a conference which, for various reasons, might never be held. Those alternatives were viewed as particularly useful where the Commission was seeking to establish a legal framework in a new area of international activity.

(e) Drafting Committee

435. Praise was expressed for the responsible approach which the Drafting Committee took to its task. The view was nevertheless expressed that the Committee could function in a somewhat more orderly and expeditious fashion. Attention was drawn in particular to the possibility of resorting again in the future to the formula providing for two weeks of concentrated work in the Drafting Committee.

(f) Duration of the session

436. The view was expressed that the usual duration of the session should be maintained and that sessions could be held wihout interruption following the Commission's usual practice, or could be divided into two parts, as was the practice in other United Nations bodies, if that was thought expedient.

437. Several representatives expressed interest in the second alternative. One of them said that some thought should be given to the possibility of the Commission's holding two separate sessions, both at Geneva: in his view, it was most important that the Commission should make known its ideas and preferences on the matter. He added that a financial study should be carried out to ensure that the current budgetary allocation would not be exceeded, possibly by way of a modest reduction in the overall duration of the sessions. Another representative suggested that consideration be given to

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splitting the annual session into two parts and holding meetings of the Drafting Committee between the regular sessions. He observed that the financial implications of such measures would probably not be very significant if one part of a split session were held in New York. Still another representative supported the proposal that the session should be split into two parts, as he felt it advisable for the Commission to consider the comments of Governments immediately after each session of the General Assembly, without waiting for its own annual session. He suggested that the Secretariat submit a statement of the administrative and financial implications of that proposal.

438. One representative, on the other hand, urged the Sixth Committee not to concern itself at the current stage with the question of a possible split of the Commission's session into two parts or with the question of the venue of the session. He pointed out that the issue was a highly delicate one and should be left for the Commission to discuss at its next session, as it proposed to do. After recalling that since its establishment in 1947 the Commission had traditionally held one continuous annual session at the United Nations Office at Geneva, he warned that any premature suggestion to change that long-standing tradition might affect the efficiency of the Commission's work or of the research work of its members, facilities for which were easily accessible at the Palais des Nations in Geneva. He therefore urged that the matter should be left in abeyance pending a recommendation by the Commission.

(g) Other remarks on the Commission's methods of work

439. It was suggested that a greater role should be given to the Secretariat, especially now that the former political problems had disappeared.

440. The observation was further made that the Commission was rightly attentive to the coordination of its work with that of other United Nations institutions, regional organizations and scientific centres that dealt with subjects related to its programme of work.

(h) Relationship between the General Assembly and Member States on the one hand and the International Law Commission on the other

441. On the extent of the guidance to be provided to the Commission by the Sixth Committee and Member States, different views were expressed.

442. Some representatives held that the Commission should request written comments at turning-points in its consideration of a topic rather than at the conclusion of its reading and make a greater effort to present a list of succinct questions and some alternative answers for States to choose between. In this context, one representative urged States to indicate their wishes to the Commission instead of waiting until a late stage to voice objections; in his view, it was of critical importance for States to inform the Commission of any doubts about the utility of topics before scarce human resources were wasted on them.

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443. According to another view, the Assembly's function should be limited to bringing to the Commission's attention the constraints imposed by international relations, the Sixth Committee's role being to provide flexible guidelines for the Commission's work.

444. Other remarks concerning the improvement of the dialogue between the Sixth Committee and the Commission related to the reporting methods of the Commission and to the mode of discussion of the Commission's report by the Sixth Committee.

445. On the first point, some representatives suggested that the piecemeal approach adopted in the past should be abandoned in principle and that draft articles submitted to the Sixth Committee for comments should be presented in such a way that the overall picture of the problem was clear and sufficiently substantial to permit meaningful debate.

446. On the second point, one representative suggested that the Sixth Committee should maintain its practice of topic-by-topic consideration of items and revert to the practice of hearing omnibus statements at the end of its debate. He further suggested that the Chairman of the Commission should introduce the Commission's report topic by topic, and give responses in the same manner at the end of the debate.

3. Cooperation with other legal bodies

447. Attention was drawn to the Commission's cooperation with such regional bodies as the Asian-African Legal Consultative Committee, the Inter-American Juridical Committee and the European Committee on Legal Cooperation. One representative reiterated his suggestion that, in addition to pursuing this cooperation, the Commission should also establish contacts and exchange views with the Movement of Non-Aligned Countries and the Commonwealth with regard to its work in the legal field. He pointed out that the changes in the international situation had given the Movement of Non-Aligned Countries greater scope to concentrate on issues and ideas relating to international law and that the United Nations Decade of International Law had had its origin in a suggestion by the Movement of Non-Aligned Countries. He further noted that the Commonwealth, which represented one of the world's principal legal systems, could make a vital collective contribution to the development of international law.

448. It was also recalled that a group of members of the Commission had participated in a seminar on the draft Code of Crimes against the Peace and Security of Mankind and the establishment of an international criminal jurisdiction, organized during the Commission's forty-third session by the Foundation for the Establishment of an International Criminal Court and the International Criminal Law Commission, and that some members of the Commission and other legal experts on disarmament had participated in the meetings of the Committee on Arms Control and Disarmament Law of the International Law Association, held at Geneva in July during the current year.

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4. International Law Seminar

449. Several representatives insisted on the importance of the International Law Seminar arranged by the Commission for the benefit of young international lawyers, mostly from developing countries. The Seminar was described as a most valuable contribution to the future of international law, and emphasis was placed on the financial efforts States should be prepared to make to facilitate the attendance of suitable students. The most recent session of the Seminar, dedicated to the memory of Paul Reuter, was described as a great success.

5. Gilberto Amado Memorial Lecture

450. Tribute was paid to the collaborative efforts of the Government of Brazil, thanks to which the latest Gilberto Amado Memorial Lecture had been delivered by the Minister of External Relations of Brazil.
